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No. \_\_\_\_\_

Office Supreme Court, U.S.  
FILED  
APR 26 1984  
ALEXANDER I. STEVAS  
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE MATTER OF THE) On Petition for  
ADOPTION OF MALE ) Writ of Certiorari  
INFANT KONAR, ) to the Court of  
NANCY SIMPSON, ) Appeals of Indiana,  
 ) First District  
 ) No. 1-283-A-50  
Petitioner )  
v. )  
PAUL BEELER, )  
LINDA BEELER, )  
Respondents)

PETITION FOR WRIT OF CERTIORARI TO  
THE INDIANA COURT OF APPEALS  
FIRST DISTRICT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Indiana violated the Petitioner's right to due process as guaranteed her by the Fourteenth Amendment to the United States Constitution when the Dearborn Circuit Court denied her motion to set aside the adoption of her son, which was granted without terminating her parental rights, without procuring her consent and without giving her notice of the adoption proceedings; and when the Indiana Court of Appeals affirmed this ruling; and when the Indiana Supreme Court refused to review the decision of the Court of Appeals.

2. Whether the State of Indiana violated the Petitioner's right to due process as guaranteed her by the Fourteenth Amendment to the United States Constitution when the Indiana Court of Appeals, First District, resolved issues of fact for the first time on appeal, thereby denying the Petitioner





the opportunity to confront these issues in the trial court, and resulting in the loss of custody of the Petitioner's son; and when the Indiana Supreme Court refused to review the decision of the Court of Appeals.



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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

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IN THE MATTER OF THE ADOPTION OF  
MALE INFANT KONAR,

NANCY SIMPSON,

Petitioner

v.

PAUL BEELER,  
LINDA BEELER,

Respondents

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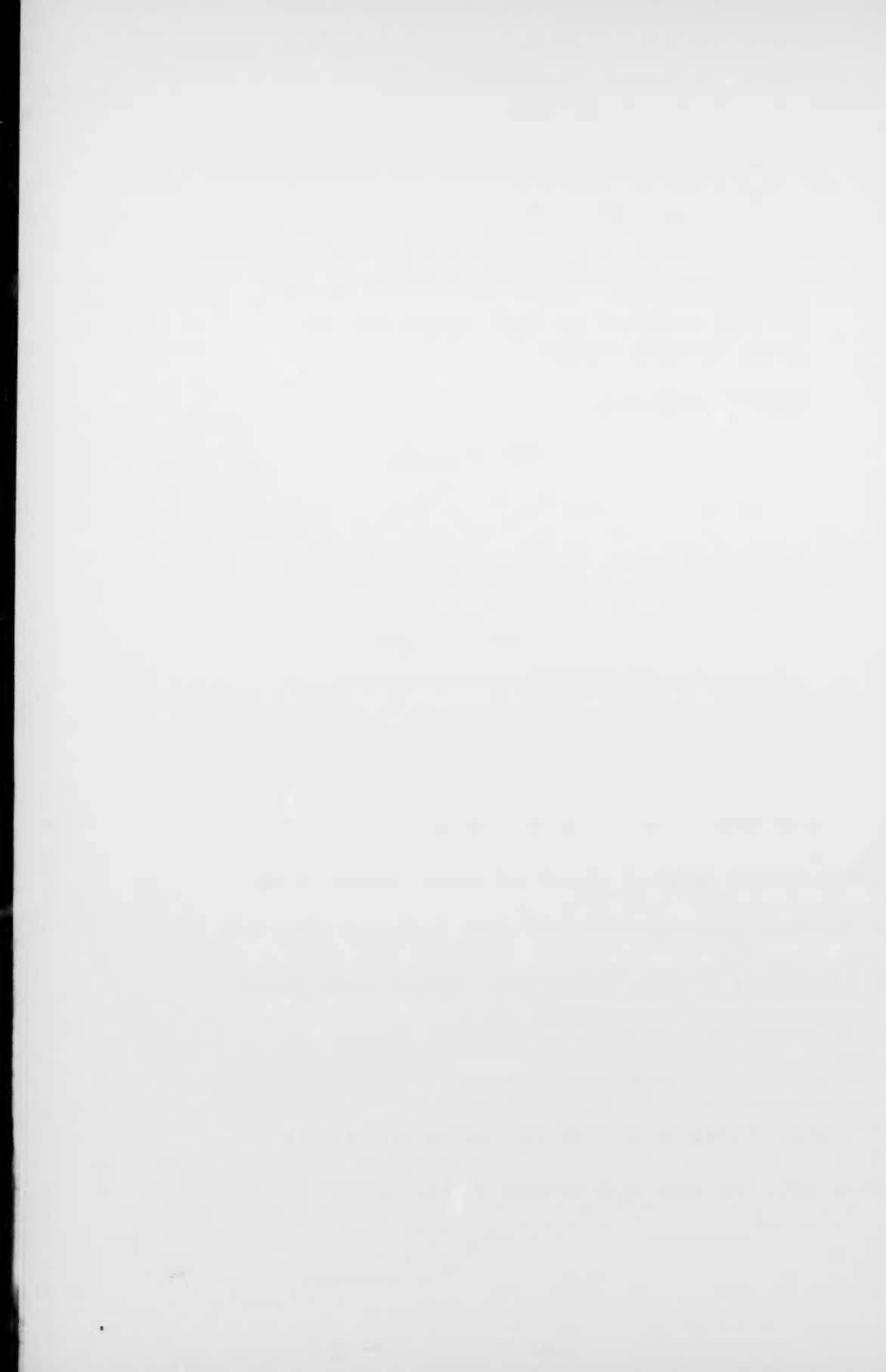
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PETITION FOR WRIT OF CERTIORARI TO THE  
INDIANA COURT OF APPEALS, FIRST DISTRICT

The Petitioner, NANCY SIMPSON, respectfully prays that a writ of certiorari issue to review the opinion of the Indiana Court of Appeals, First District, which was filed on October 12, 1983.

OPINION BELOW

The Indiana Court of Appeals, First District, in its published opinion of





March 5, 1981, No. 1-880-A-221, affirmed the decision of the Washington Circuit Court of Indiana that the Petitioner had, in fact, legally revoked her consent to adoption. A copy of this opinion is attached as Appendix A.

In another published opinion of October 12, 1983, No. 1-283-A-50, the Indiana Court of Appeals, First District, affirmed the decision of the Dearborn Circuit Court of Indiana which denied the Petitioner's motion to set aside the adoption decree. A copy of this opinion is attached as Appendix B. The Court of Appeals, No. 1-283-A-50 denied the Petitioner's Petition for a rehearing. A copy of this order is attached as Appendix C. The Indiana Supreme Court denied the Petition to Transfer. A copy of this order is attached as Appendix D.

#### JURISDICTION

On October 12, 1983, the Indiana Court of Appeals, First District, decided Cause



No. 1-283-A-50 with a written opinion; and this decision was against the Petitioner herein, Nancy Simpson. A copy of this opinion is attached as Appendix B. A Petition for Rehearing was timely filed in the Indiana Court of Appeals on October 29, 1983; this Petition was denied on November 29, 1983. A copy of this decree is attached as Appendix C.

The Petitioner herein then timely filed a Petition to transfer the cause to the Indiana Supreme Court for review; and this Petition was denied on February 17, 1984. A copy of this decree is attached as Appendix D. The Indiana Rules of Appellate Procedure, Rule 11(B)(8) specifically prohibits a petition for rehearing upon denial of a Petition to Transfer. Wherefore, the Petitioner herein now petitions the United States Supreme Court for a Writ of Certiorari to issue to the Indiana Court of Appeals, First District. The jurisdiction of this court is invoked under Title 28, United



States Code, Section 1254(1).<sup>1</sup>

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment

XIV:

"...nor shall any State deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

On April 16, 1979, Nancy Simpson, formerly Nancy Konar, gave birth to a son in Washington County, Indiana. On April 18, 1979 she signed a pre-printed form supplied by the Washington County Department of Public Welfare with Side A entitled "Voluntary Termination or Relinquishment of Parental Rights", and Side B entitled "Consent to Adoption". Through these documents the issues of the right to consent to the adoption and the right to receive notice of adoption proceedings were raised. The child's father later signed identical documents.

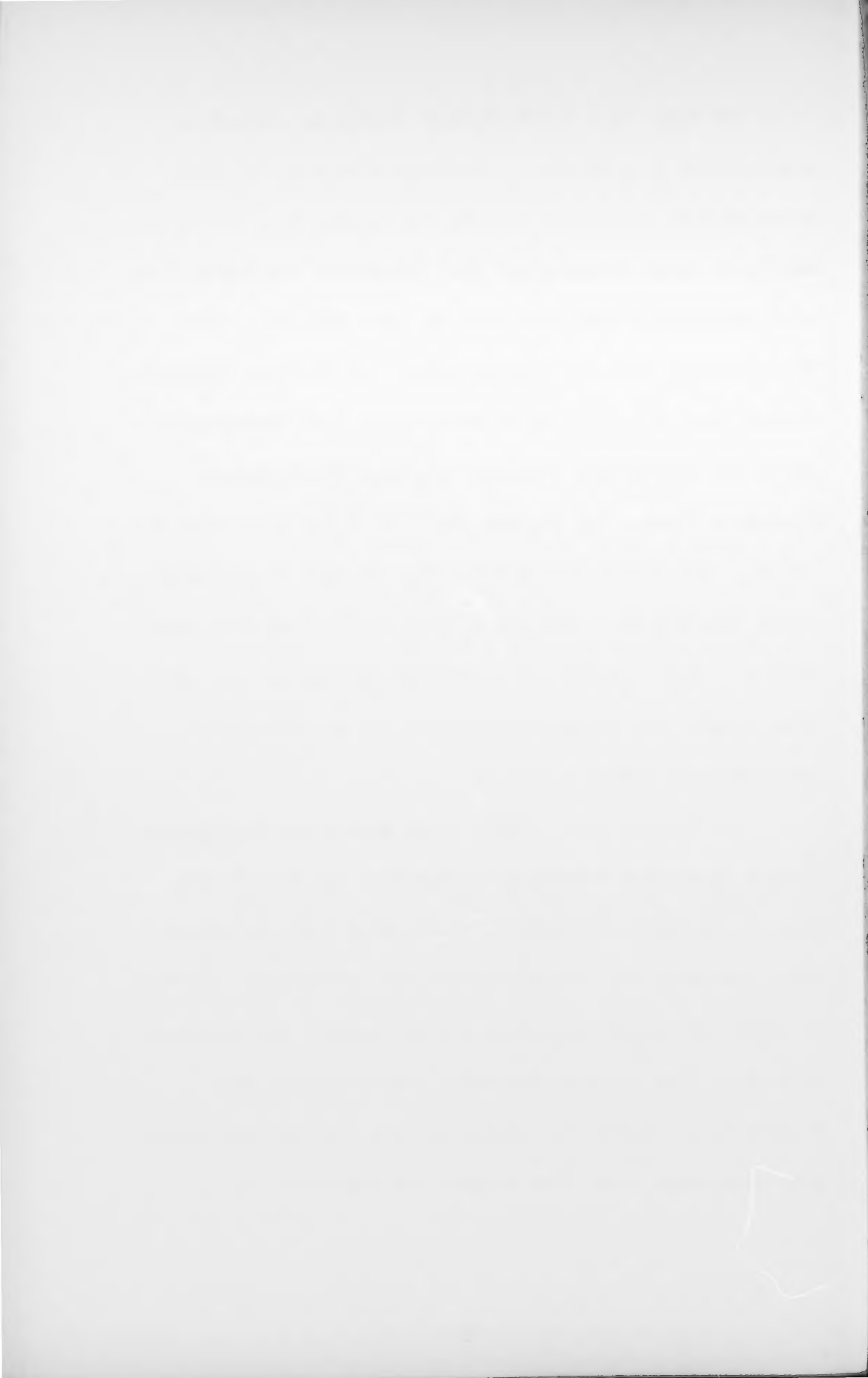
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1. No other petitioner is involved in this petition.



On May 22, 1979 Nancy Simpson filed a complaint for Writ of Habeas Corpus in the Washington Circuit Court in Cause No. 79-C-83 wherein she rescinded her consent to adoption and demanded the return of the child. The Washington County Department of Public Welfare responded by filing a Petition for Termination of Parental Rights in the Washington Circuit Court in Cause No. 79 J 25 on June 8, 1979. On June 27, 1979, Ms. Simpson answered this Petition. In both the Petition and the Answer the issues of consent to adoption and the right to receive notice of an adoption proceeding were raised.

On April 23, 1980, the Washington Circuit Court granted summary judgment in favor of Nancy Simpson, finding that she had revoked her consent to termination of parental rights. A copy of this opinion is attached as Appendix E. The Court thereby reinstated Ms. Simpson's right to receive notice of adoption proceedings and the right to consent to





adoption. This ruling was affirmed by the Indiana Court of Appeals on March 5, 1981. A copy of this opinion is attached as Appendix A.

Notwithstanding the Washington Circuit Court proceedings, Paul and Linda Beeler filed a Petition for Adoption in the Dearborn Circuit Court on December 14, 1979. The natural mother, Nancy Simpson, was not given notice of these proceedings and, in fact, was unaware of the existence of the Dearborn Court adoption proceedings until September, 1981.

On June 2, 1980, the Dearborn Court granted the decree for adoption. As soon as Ms. Simpson learned of the Dearborn Decree of Adoption, she filed a motion to set it aside. This motion was filed on September 29, 1981. Therein she alleged that the Adoption Decree was void because she had not consented to the adoption nor had she received notice of the adoption proceedings. She further alleged



that the Washington Circuit Court ruling had reinstated both her right to consent to adoption and her right to receive notice of the proceedings.

The Dearborn Circuit Court refused to rule on Ms. Simpson's motion until January 5, 1983. At that time the court denied the natural mother's motion to set aside the adoption decree. A copy of this order is attached as Appendix F. The Dearborn Court upheld the decree of adoption based on the natural mother's failure to notify the Dearborn Court that she had revoked her consent to adoption. The court ruled this way, even though the natural mother had no notice of the adoption proceedings.

Ms. Simpson filed a timely Motion to Correct Errors wherein she alleged in Paragraph 2 that the Dearborn Court's order violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. She averred, inter alia, that she was not



given notice of the Adoption Petition and hearing thereon.

Nancy Simpson then perfected her appeal to the Indiana Court of Appeals. In her appellate brief, Argument II, she submitted that the Adoption Decree was void under the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it terminated her rights as a natural parent without her consent and without giving her notice of the adoption proceedings, both of which she was entitled to.

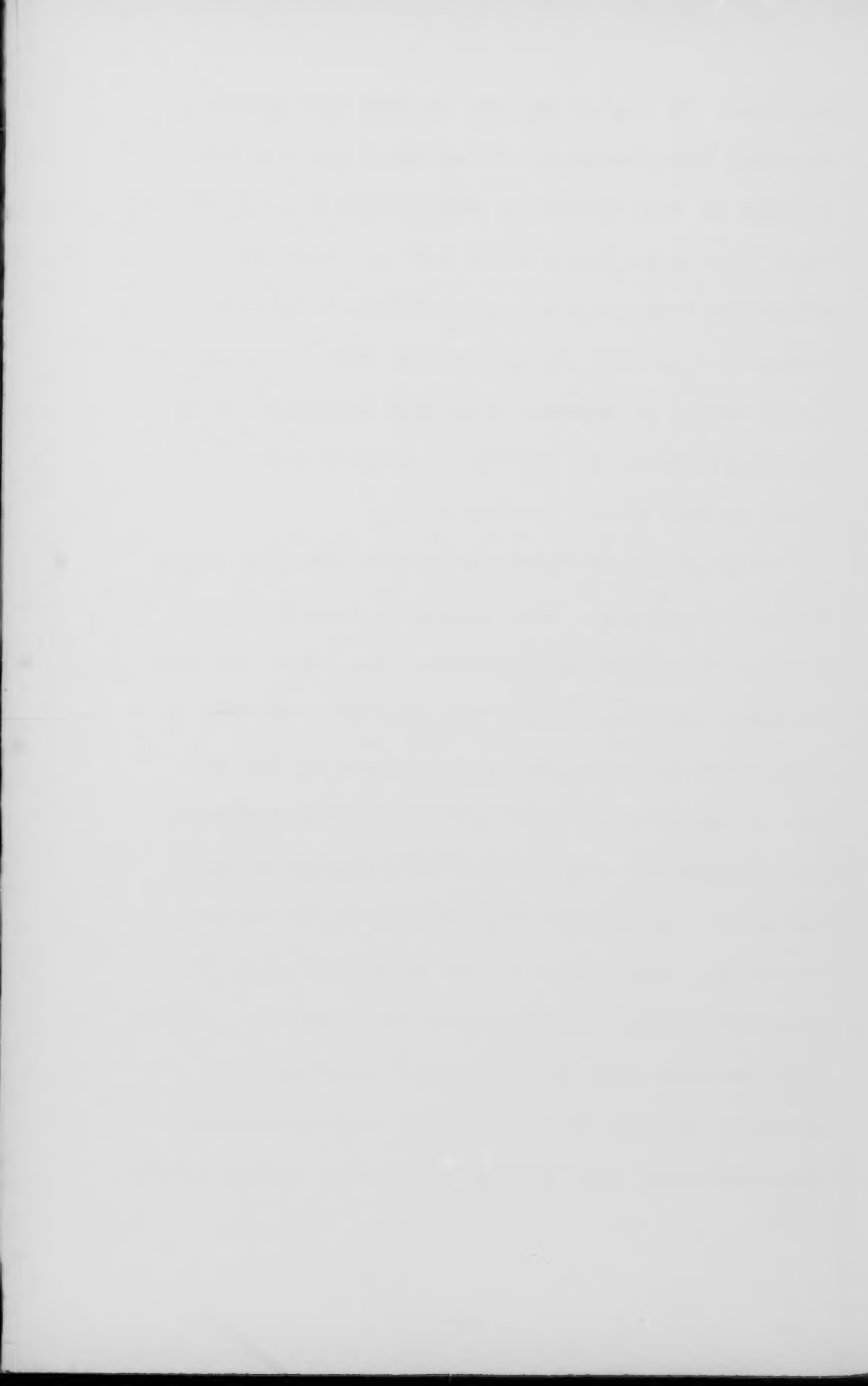
The Court of Appeals upheld the adoption, basing its decision on the finding that Ms. Simpson's consent to the adoption had not been invalidated.

Ms. Simpson filed a timely Petition for Rehearing. Therein, in Paragraphs 4(F)(1) and (2), she alleged that as a natural mother in an adoption proceeding, her rights to due process, as guaranteed her by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, were violated



because: 1) the adoption decree was granted without her consent and without giving her notice of the adoption proceedings; and 2) when the Court held that her consent to adoption had not been invalidated, which issue was raised by the appellees for the first time on appeal, she was thereby denied an opportunity to confront this issue of fact in the trial court.

The Court of Appeals denied her Petition for a Rehearing. Ms. Simpson then filed a timely Petition to Transfer the cause to the Indiana Supreme Court for review. In her Petition to Transfer and supporting brief, she alleged that her rights to due process, as guaranteed her by the Fourteenth Amendment of the United States Constitution were violated, because: 1) the adoption was granted without procuring her consent, without terminating her parental rights, and without giving her notice of the adoption proceedings; and 2) the Appellate Court based



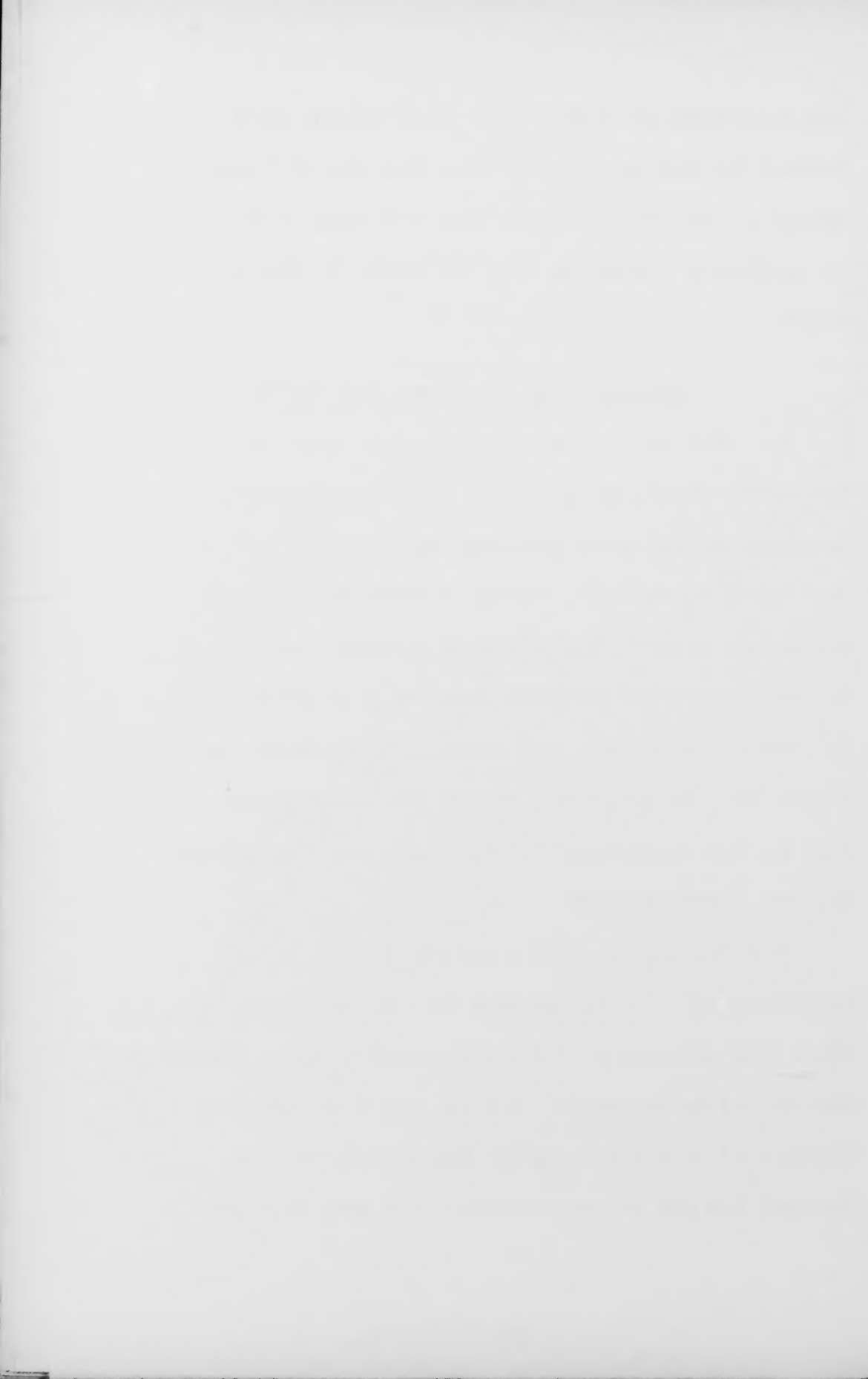


its decision on issues of fact which were raised by the appellees for the first time on appeal, thereby denying her the opportunity to confront these issues of fact in the trial court.

#### REASON FOR GRANTING THE WRIT

1. The Petitioner maintains that an adoption which is granted in an adversarial proceeding without procuring the consent of the natural mother, without terminating her parental rights and without giving her notice of the adoption proceedings is a fundamentally unfair process. As such, it violates her right to due process, which is guaranteed her by the Fourteenth Amendment to the United States Constitution.

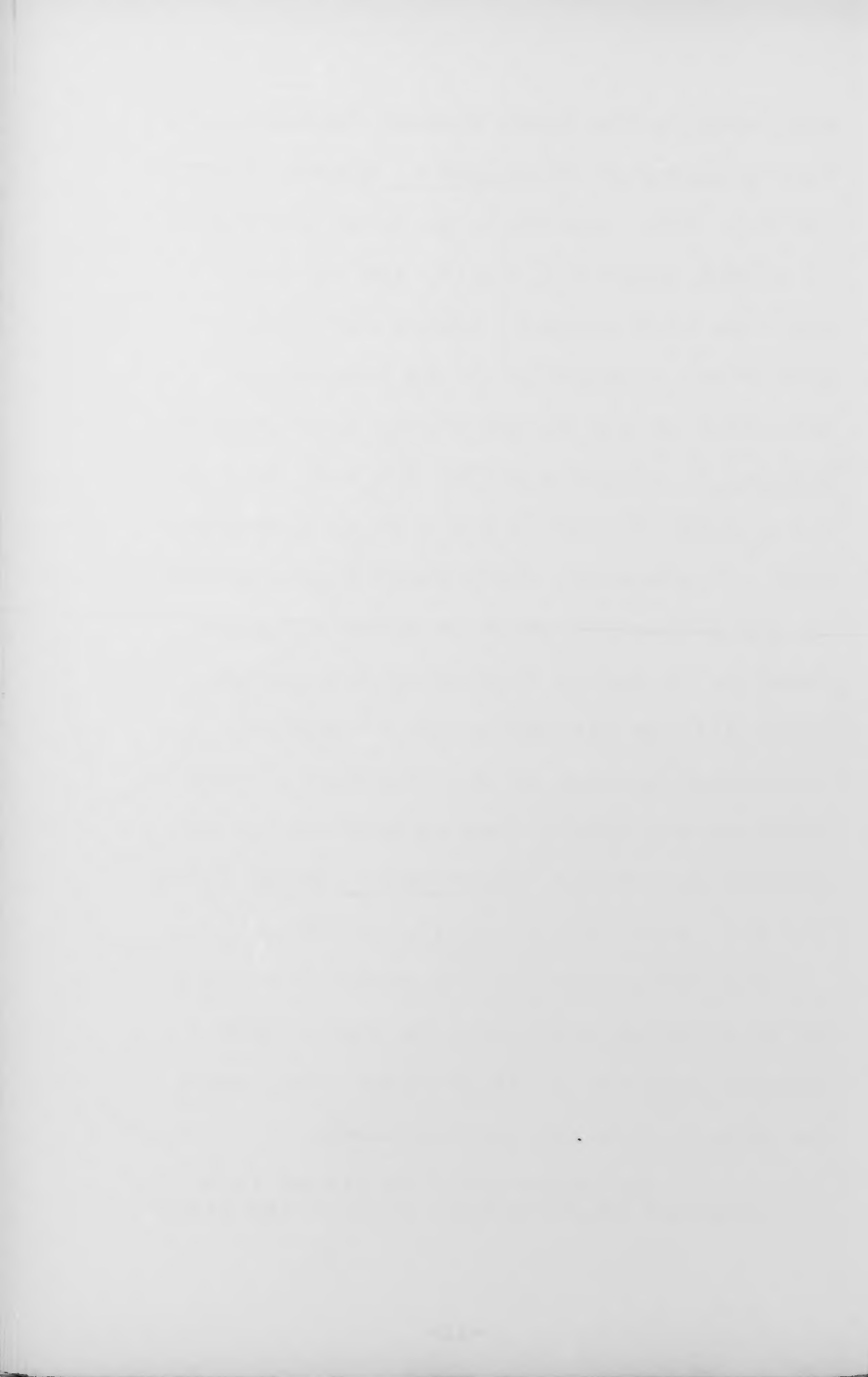
The United States Supreme Court is unwavering in its adherence to the principle that the parent-child relationship is a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and may not be



destroyed by the State without fundamentally fair procedures. Stantosky v. Kramer, (1982) 455 U.S. 720. The right to raise one's child is deemed essential, basic, and far more precious than property rights and clearly within the protection of the Fourteenth Amendment of the United States Constitution. Stanley v. Illinois (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 LEd 2d 551. It is elementary that a fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of proceedings and afford them an opportunity to present objections. Armstrong v. Manzo (1965) 380 U.S. 545, 85 S.Ct. 1187, 14 LEd 2d 62.

The involvement of the State of Indiana in an adoption proceeding is significant. Indiana Code §31-3-1-3 provides that, except in certain, limited circumstances:

...no child shall be placed in a proposed adoptive home without the prior



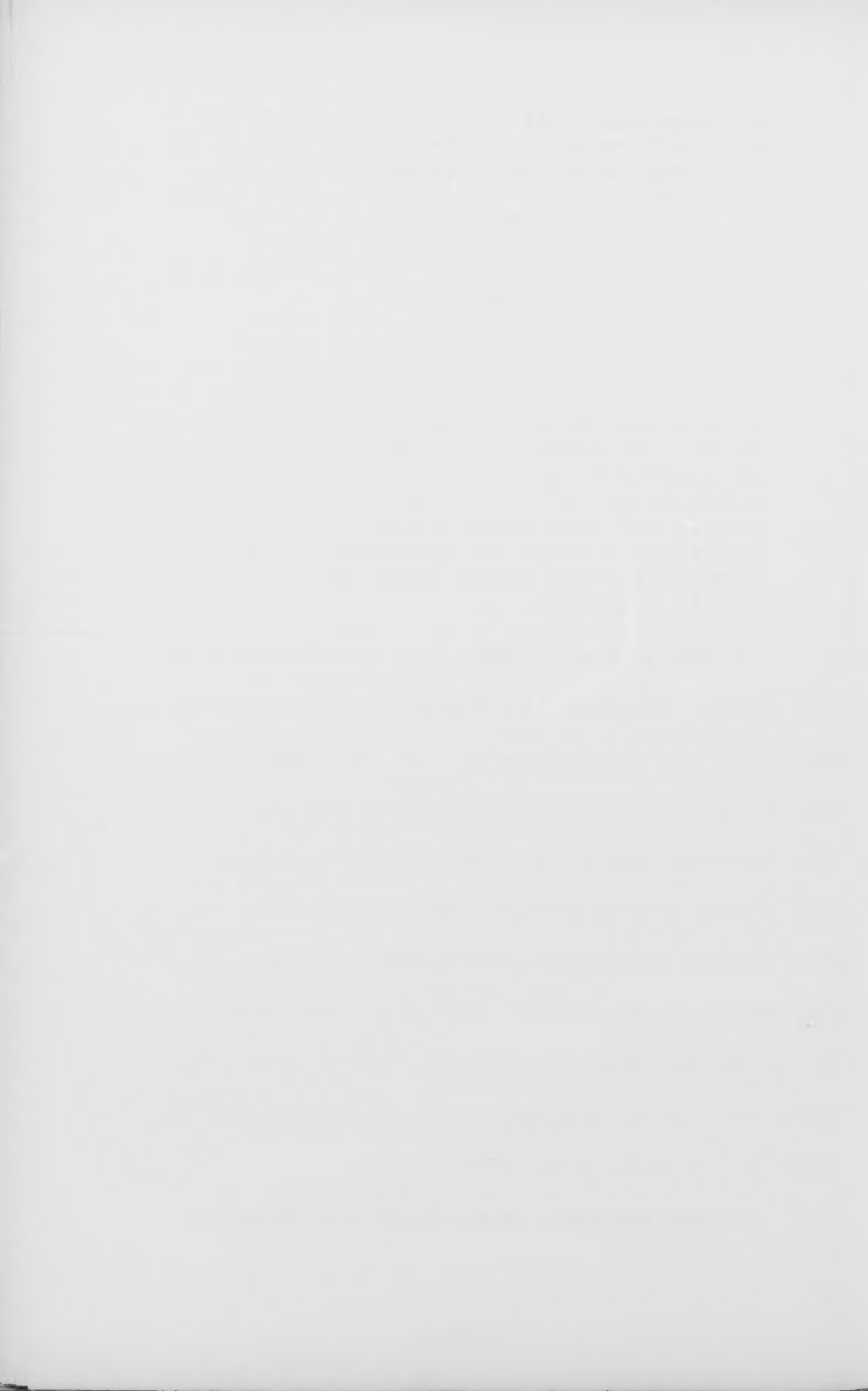
written approval of such placement by a duly-licensed child-placing agency or a county department of public welfare, which agency or county department shall be approved for such purpose by the state department of public welfare. Such approval shall be filed along with the petition for adoption.

The Statute further provides that:

No adoption shall be granted in this state except after the court has heard the evidence and after a period of supervision by a duly-licensed child-placing agency or a county department of public welfare which agency or county department shall be approved for such purpose by the state department of public welfare.

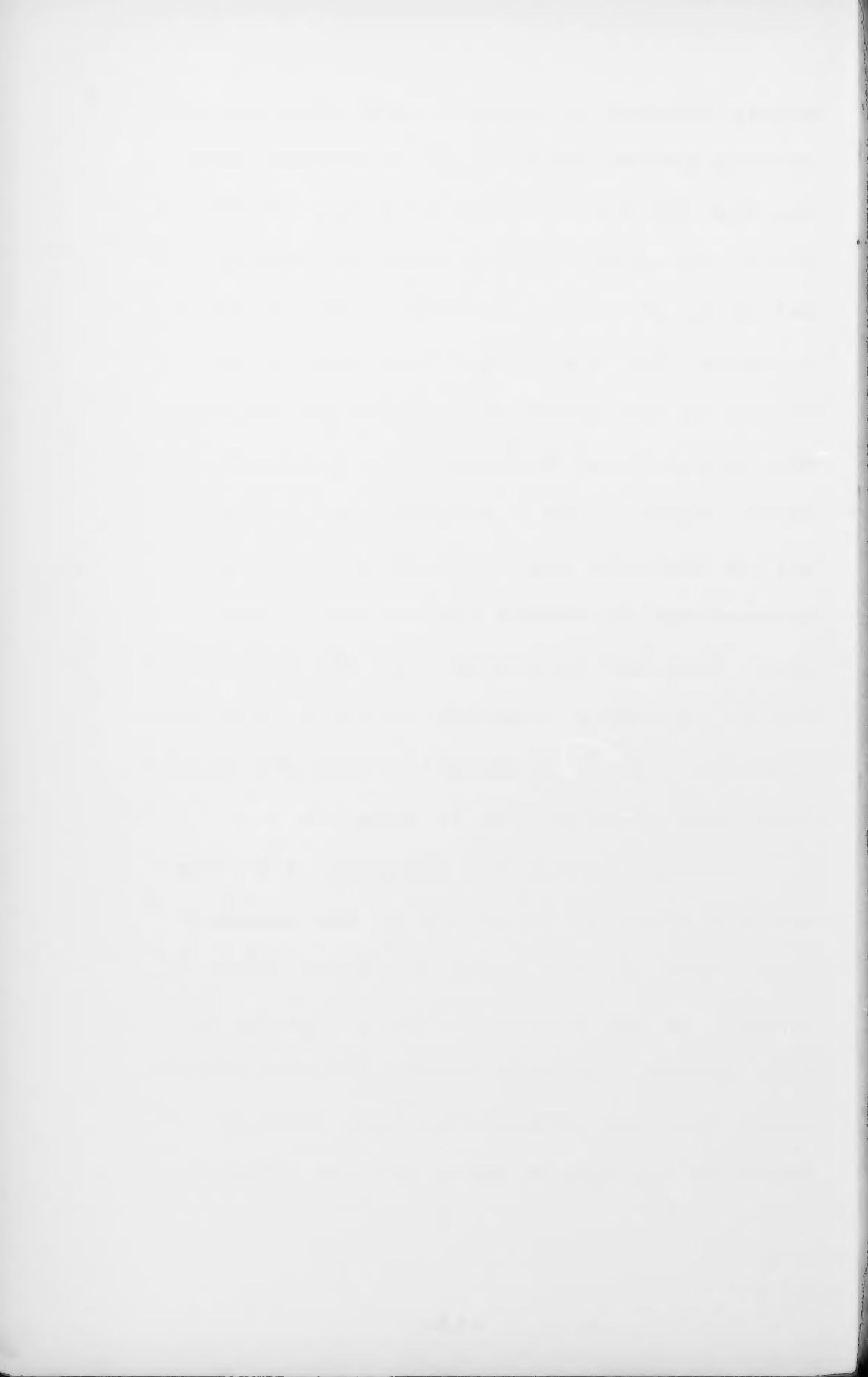
In the present case, the involvement of the State, through its Department of Public Welfare, was significant. It is clear that the direct involvement of state officials in the instant adoption proceedings provided the state action which gave rise to the Fourteenth Amendment protection. See e.g. Parham v. J. R. (1979) 442 U.S. 584, 600; Flagg Bros., Inc. v. Brooks (1978) 436 U.S. 149, 157, n.5; Adickes v. S. M. Kress and Co. (1970) 398 U.S. 144, 152.

In the instant case, when the natural



mother refused to consent, the adoption proceeding became adversarial in nature; and she was thereby entitled to a fair opportunity to establish her right to custody before an impartial tribunal. Ms. Simpson contends that she should have been given notice of the adoption proceedings prior to the decree being entered. The Dearborn Court, through the pleadings, had actual notice that she was involved in collateral proceedings to revoke her consent. The court also had knowledge that the natural mother had never received notice of the proceedings. It is fundamental that she should have been given notice at this stage.

However, assuming, arguendo, that she was not entitled to notice of the proceedings, then she was certainly entitled to prevail on her motion to set aside the adoption decree. In this motion she advised the court that her consent had been revoked prior to the decree being entered. Therefore,





when the Dearborn Court, with full knowledge  
that the natural mother's consent had been  
revoked prior to the adoption decree, nevertheless upheld the decree of adoption because the natural mother had not sustained her non-existent burden of notifying the court, when she had no knowledge of the proceedings in Dearborn County, and the Dearborn Court knew this, the Dearborn Court flew in the face of the Due Process Clause of the United States Constitution and all the laws of the State of Indiana.

Because the natural mother had not consented to the adoption and because she was not given notice of the proceedings, her rights to due process were violated and the adoption was void. The Appellate Court acted erroneously when it upheld the Dearborn Court's ruling. The Indiana Supreme Court erroneously denied the Petitioner's Petition to Transfer.

The disposition, as law and justice



require for Petitioner Simpson, is a finding by this Court that she was denied due process of law when the Dearborn Circuit Court denied her motion to set aside the adoption decree, when the Indiana Court of Appeals, First District, affirmed the trial court's ruling and when the Indiana Supreme Court refused to review the decision of the Court of Appeals. The Petitioner prays that this cause be remanded to the Indiana Court of Appeals with directions that the Adoption Decree be set aside and the child returned to its natural mother.

2. The Petitioner also argues that the State of Indiana denied her the right to raise her child without due process of law when the Indiana Court of Appeals, First District, resolved issues of fact which were raised for the first time on appeal; and these new findings of fact were then used to uphold the trial court's ruling. She was thereby denied the opportunity to confront these issues in the trial court, resulting



in the loss of her son.

The Respondents herein asserted for the first time on appeal in the Indiana Court of Appeals No. 1-283-A50 that the Washington Circuit Court proceedings in Cause No. 79 J 25 concerned only Side A of the preprinted form entitled "Voluntary Termination or Relinquishment of Parental Rights", and not Side B entitled, "Consent to Adopt". This issue was never presented by the Respondents herein to the Washington Circuit Court in Cause No. 79 J 25, or the Dearborn Circuit Court in Cause No. A-2-80. In fact, it directly contradicts their Petition for Adoption which was filed in the Dearborn Circuit Court in Cause No. A-2-80 and which acknowledged that the natural mother was "...seeking to revoke her consent to the adoption of the child" in the Washington Circuit Court.<sup>2</sup>

The Respondents herein had ample

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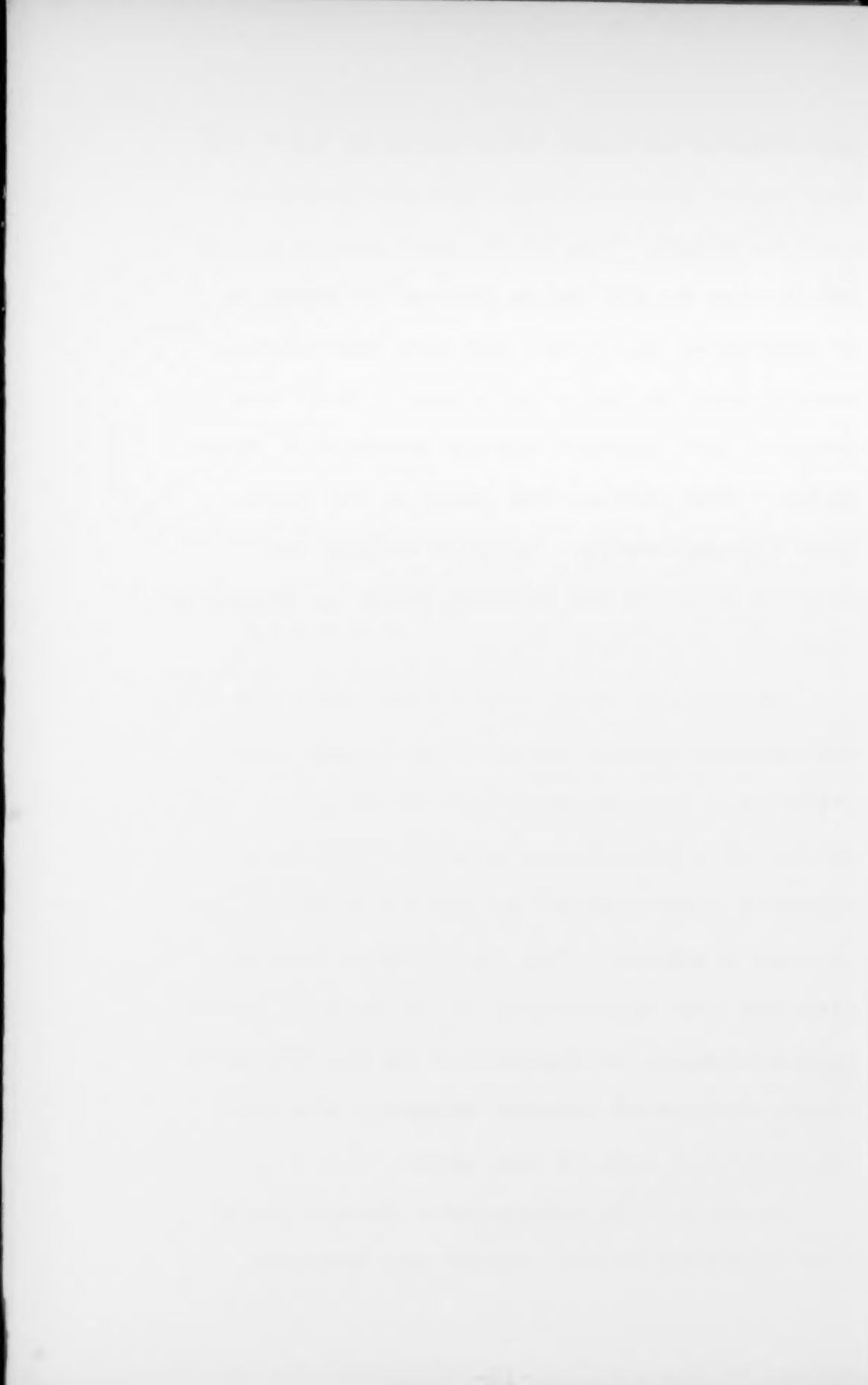
2. Paragraph 7 of the Petition for Adoption which can be found on Page 2 of the Common Law Record on appeal.



opportunity to raise this issue in both the Washington Circuit Court and the Dearborn Circuit Court. The Petitioner herein filed her Motion to Set Aside Decree of Adoption on September 29, 1981; and the Respondents herein were served with a copy. Both the original and special judges heard oral arguments. This motion was pending for more than fifteen months, until a ruling was finally made by the special judge on January 5, 1983.

Throughout this lengthy process, the Respondents herein could have raised this issue in a written Response to Motion to Set Aside, in a Responsive Brief to the Petitioner's herein Brief to the trial court, or at oral argument. The Respondents herein also had the opportunity to raise this issue in a Statement in Opposition to Petitioner's herein Motion to Correct Errors. The Respondents did none of the above.

Finally, the Respondents herein could have objected in writing to the Dearborn





Circuit Court's specific finding that "The Washington Circuit Court (had) held that Nancy Simpson had revoked her consent to the adoption herein.<sup>3</sup> (emphasis added) This statement of the Dearborn Court rejects the distinction later made by the Respondents herein on appeal. No response or objection to that finding was made.

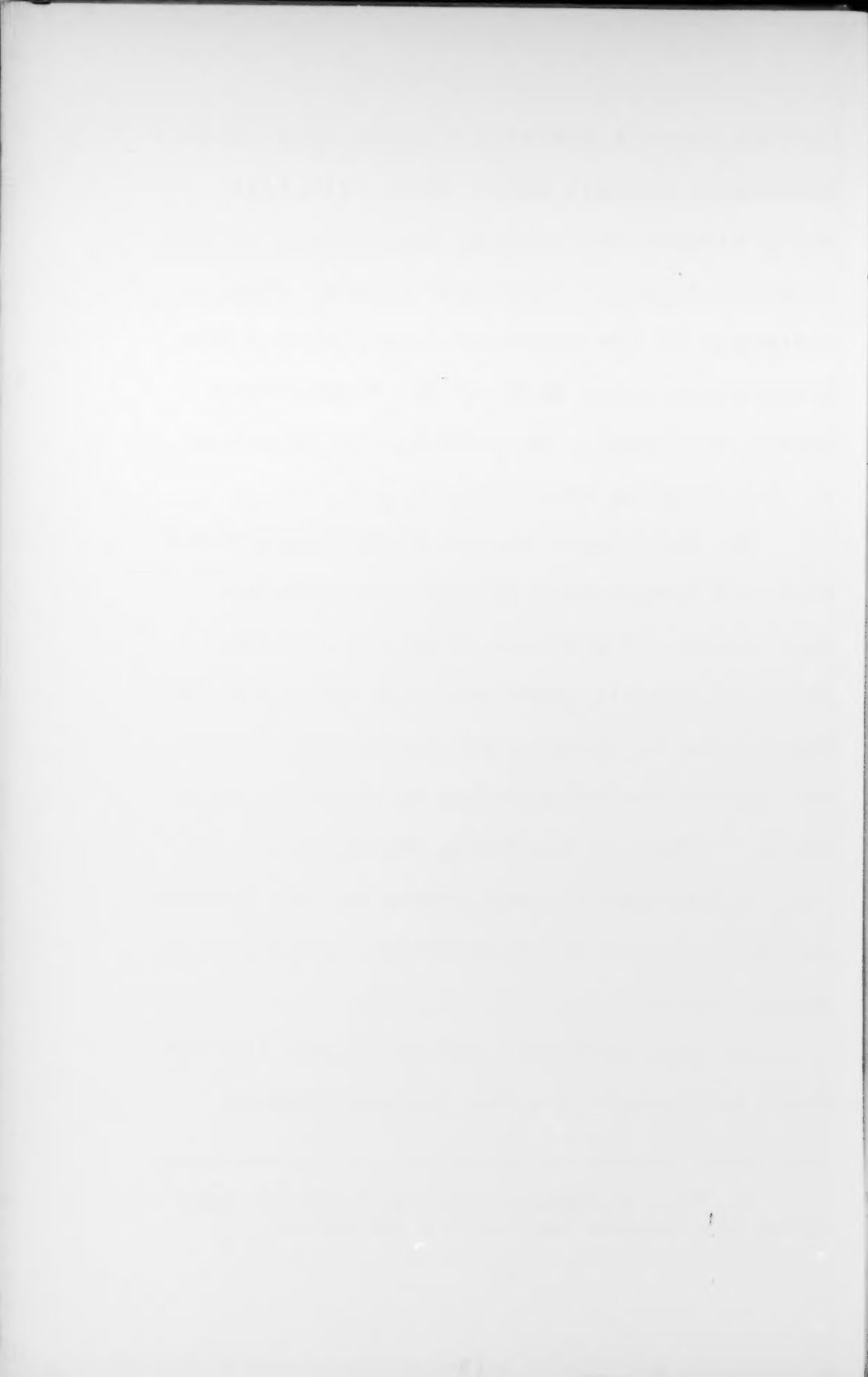
The Petitioner herein rightfully believed that the Respondents herein had conceded this point. Therefore, when the Indiana Court of Appeals resolved this issue for the first time on appeal, the Petitioner herein was denied the opportunity to confront this issue of fact in the trial court.

A fundamental requirement of due process is the opportunity to be heard. Armstrong v. Manzo, Supra.

In this case, the action of the Indiana Court of Appeals and the Indiana Supreme

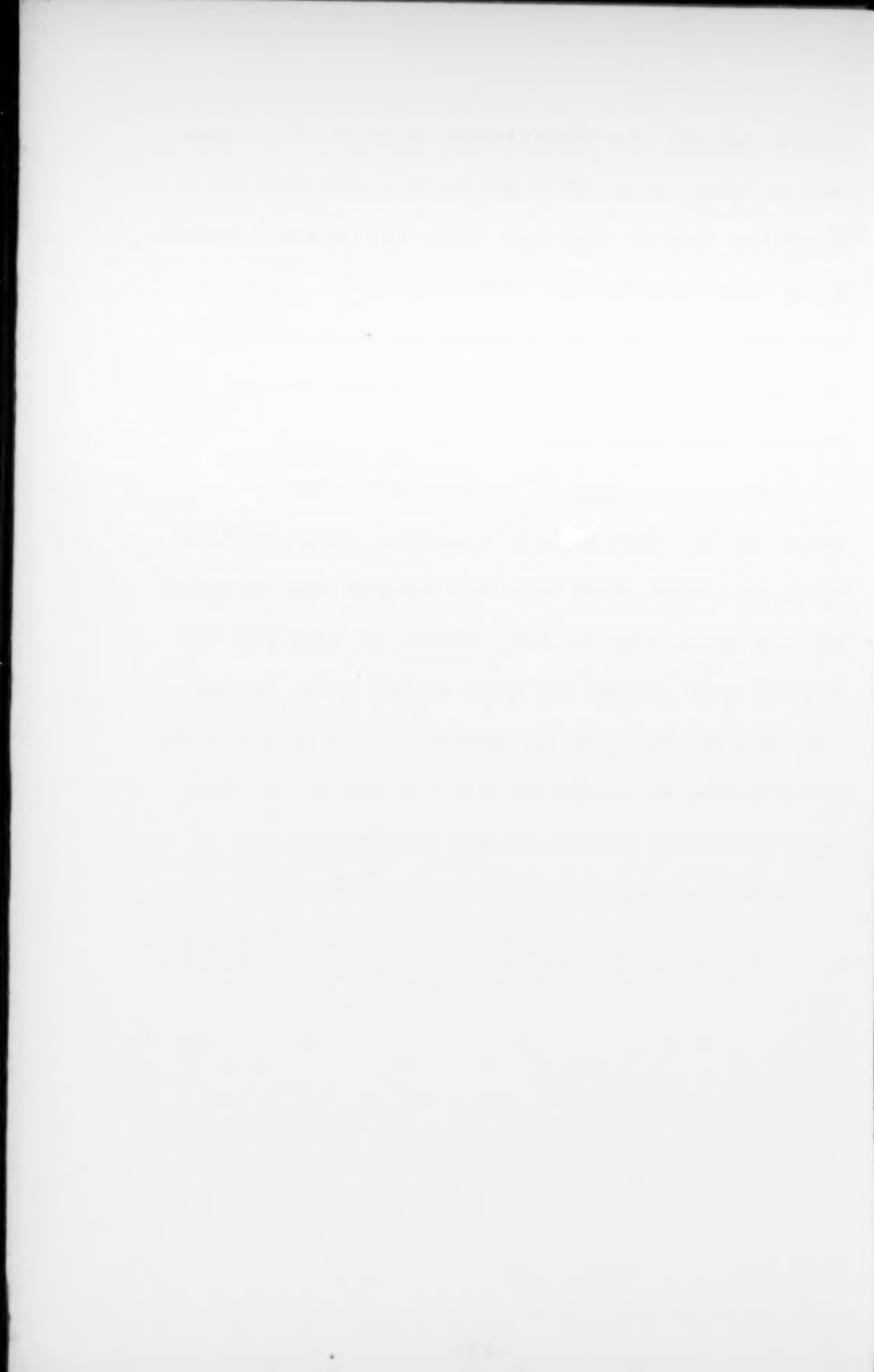
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3. This quotation can be found on Page 63 of the common law record on appeal.



Court denied the Petitioner herein of a hearing on the issue of whether her consent to adoption had or had not been litigated. Therefore, she was denied the liberty of raising her son without due process as guaranteed her by the Fourteenth Amendment to the United States Constitution.

The disposition, as law and justice require for Petitioner Simpson, is a finding by this Court that she was denied due process of law when the Indiana Court of Appeals resolved new issues of fact which were raised for the first time on appeal. She prays that this cause be remanded with directions that the adoption decree be set aside and the child returned to its natural mother.



CONCLUSION

For the foregoing reasons, Petitioner, NANCY SIMPSON, respectfully requests that a writ of certiorari issue review the judgment of the Indiana Court of Appeals, First District.

Respectfully submitted,

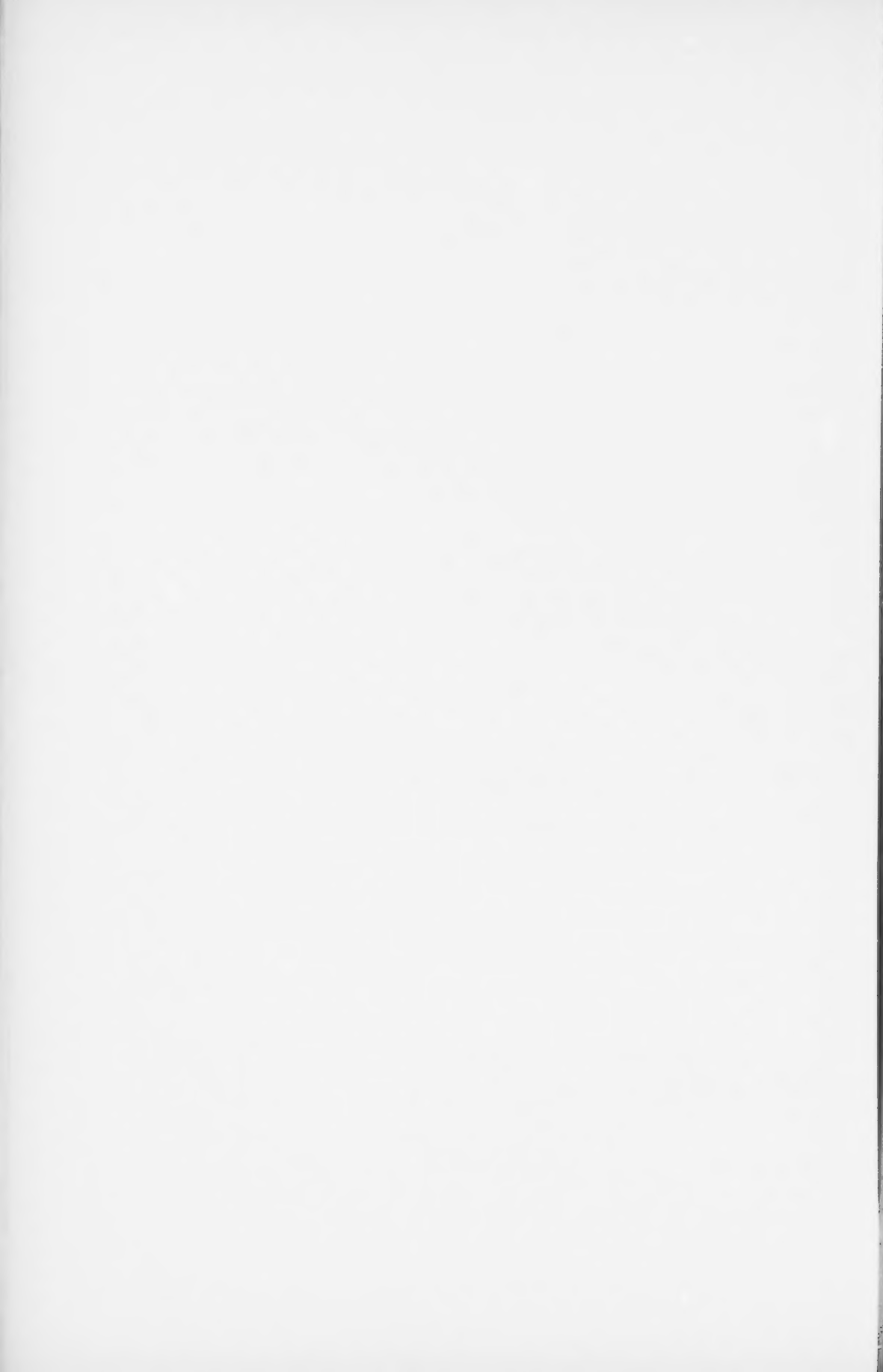
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Attorney for Petitioner

Dated: April 16, 1984



A P P E N D I X





APPENDIX A-1

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IN THE  
COURT OF APPEALS OF INDIANA  
FIRST DISTRICT

WASHINGTON COUNTY       )  
DEPARTMENT OF            )  
PUBLIC WELFARE,         )  
                              )  
                  Appellant.   )  
                              )  
                  v.            ) NO. 1-880-A-222  
                              )  
NANCY J. KONAR,         )  
                              )  
                  Appellee.   )

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APPEAL FROM THE WASHINGTON CIRCUIT COURT  
JUVENILE DIVISION  
The Honorable Harry S. Paynter, Special Judge  
CAUSE NO. 79 J 25

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ROBERTSON, J.

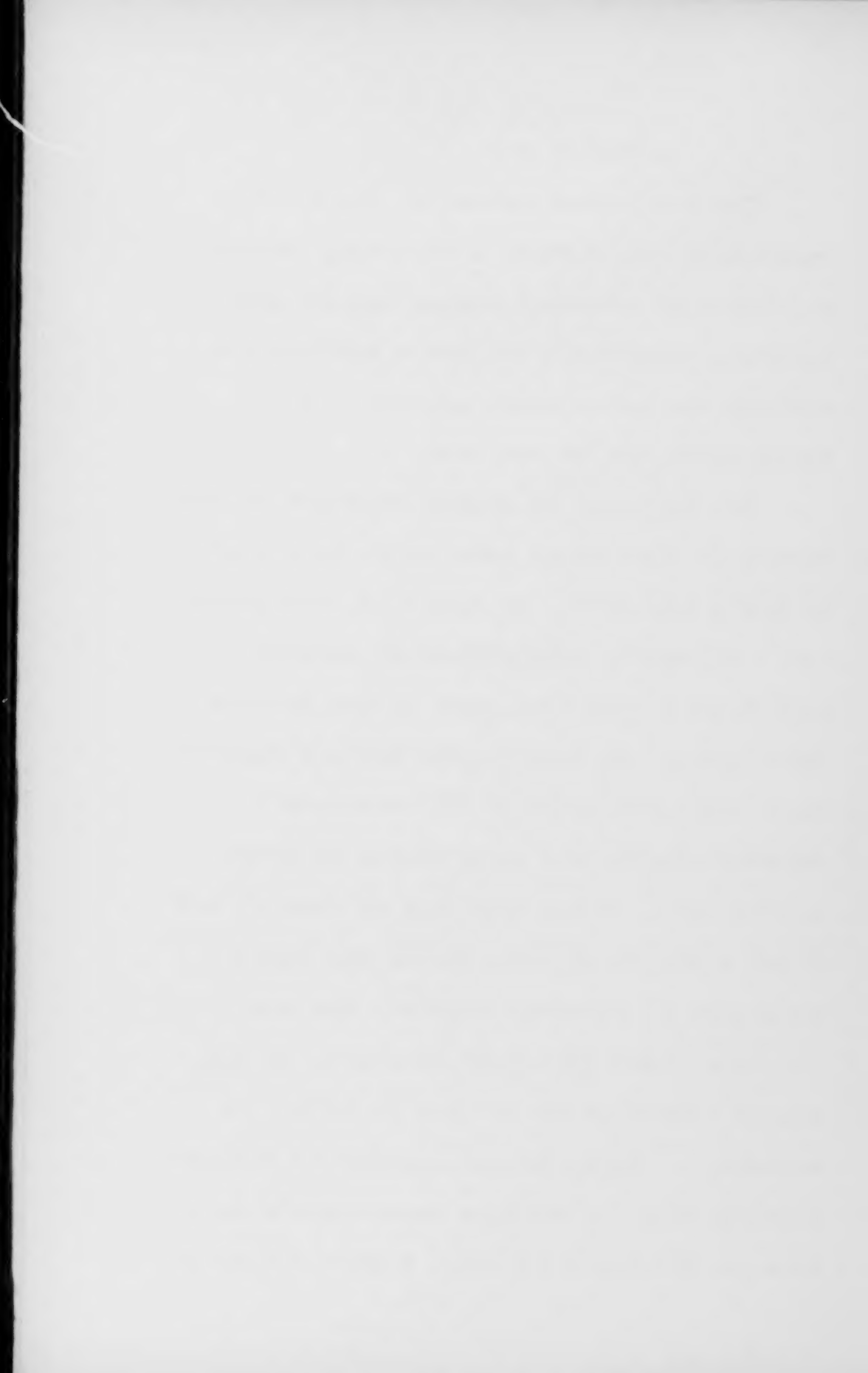
The petitioner-Appellant Welfare Department is appealing a judgment which ended proceedings to terminate the parental rights of the respondent appellee Konar. We affirm.



## APPENDIX A-2

The two issues raised by the Welfare Department are whether a voluntary relinquishment of parental rights can be unilaterally rescinded without a hearing and whether the trial court applied the appropriate law to the case.

The sequence of events relevant to the appeal is that Konar gave birth to a child on April 16, 1979. On April 18, she executed a voluntary termination of parental rights on a form furnished by the Welfare Department. On June 8, the Welfare Department filed its Petition to Terminate Parental Rights and gave notice to Konar accordingly. Konar appeared on June 27 and filed a notice of rescission of her relinquishment of parental rights. The new Juvenile Code, IND. CODE 31-6-1-1, et seq. became effective on October 1, 1979. On November      Konar filed a motion to dismiss stating that the Welfare Department's Petition to Terminate Parental Rights failed to

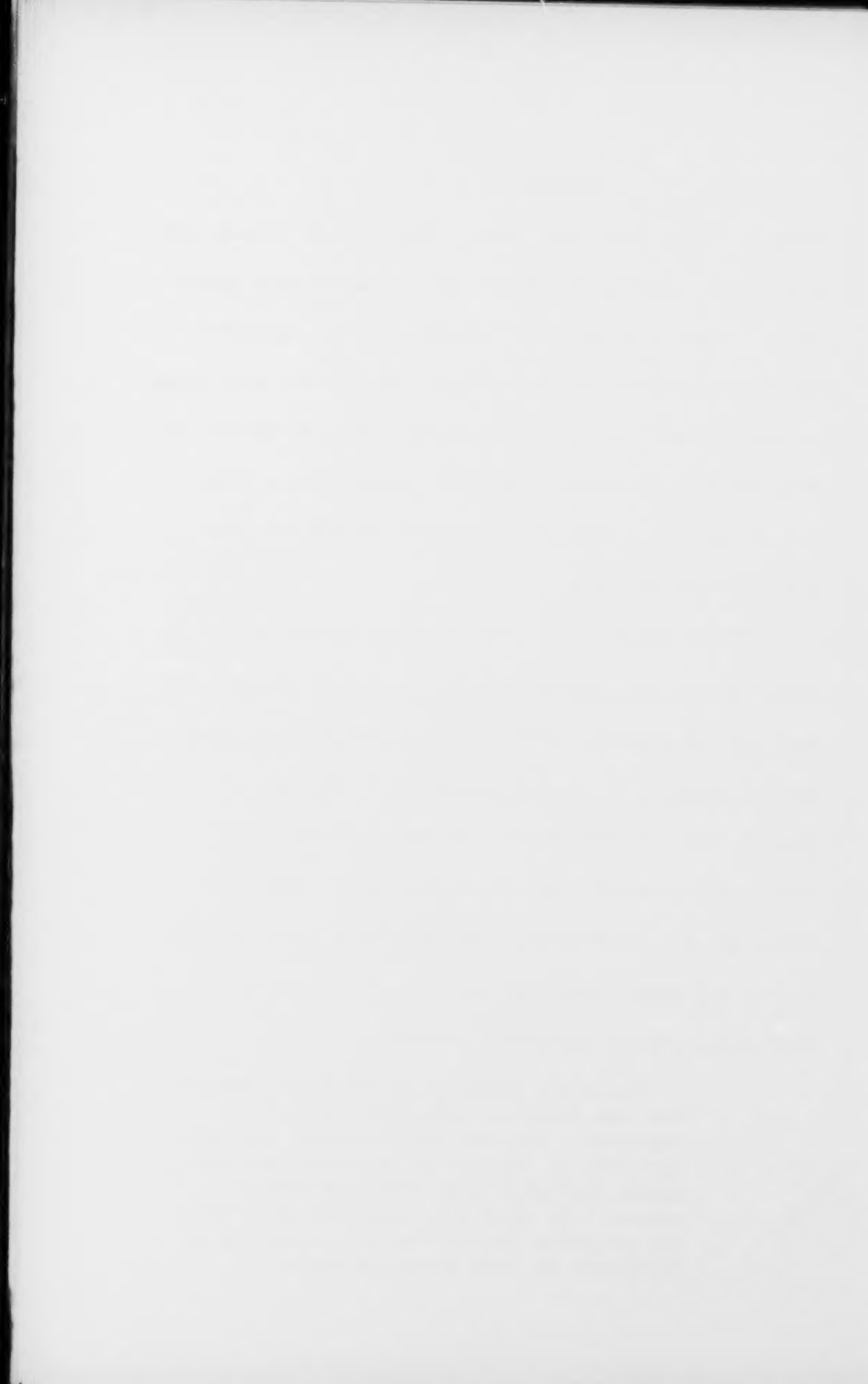


### APPENDIX A-3

comply with the new law. The trial court on April 23, 1980, without an evidentiary hearing, ruled the mother could revoke consent to termination of parental rights at any time prior to and at a final hearing. Without so explicitly stating in it's dismissal, the trial court applied the provisions of the new Juvenile Code.

This court, in the recent opinion of In The Matter of Damon Miedl, a child under the age of 18 years, and, In The Matter of Shaun David Miedl, a child under the age of 18 years, No. 3-480-A-94, filed February 18, 1981, discussed the "retroactive" application of IC 31-6-5-4. In holding that IC 31-6-1-1 et seq. applies to still pending matters, Judge Chipman stated:

There are numerous differences between the new Juvenile Code and the law it replaced. The new law provides new protections in various proceedings and mandates different time requirements in others. IC 31-6-1-1 lists the purposes and policies behind the act including an insurance of fair hearings and a

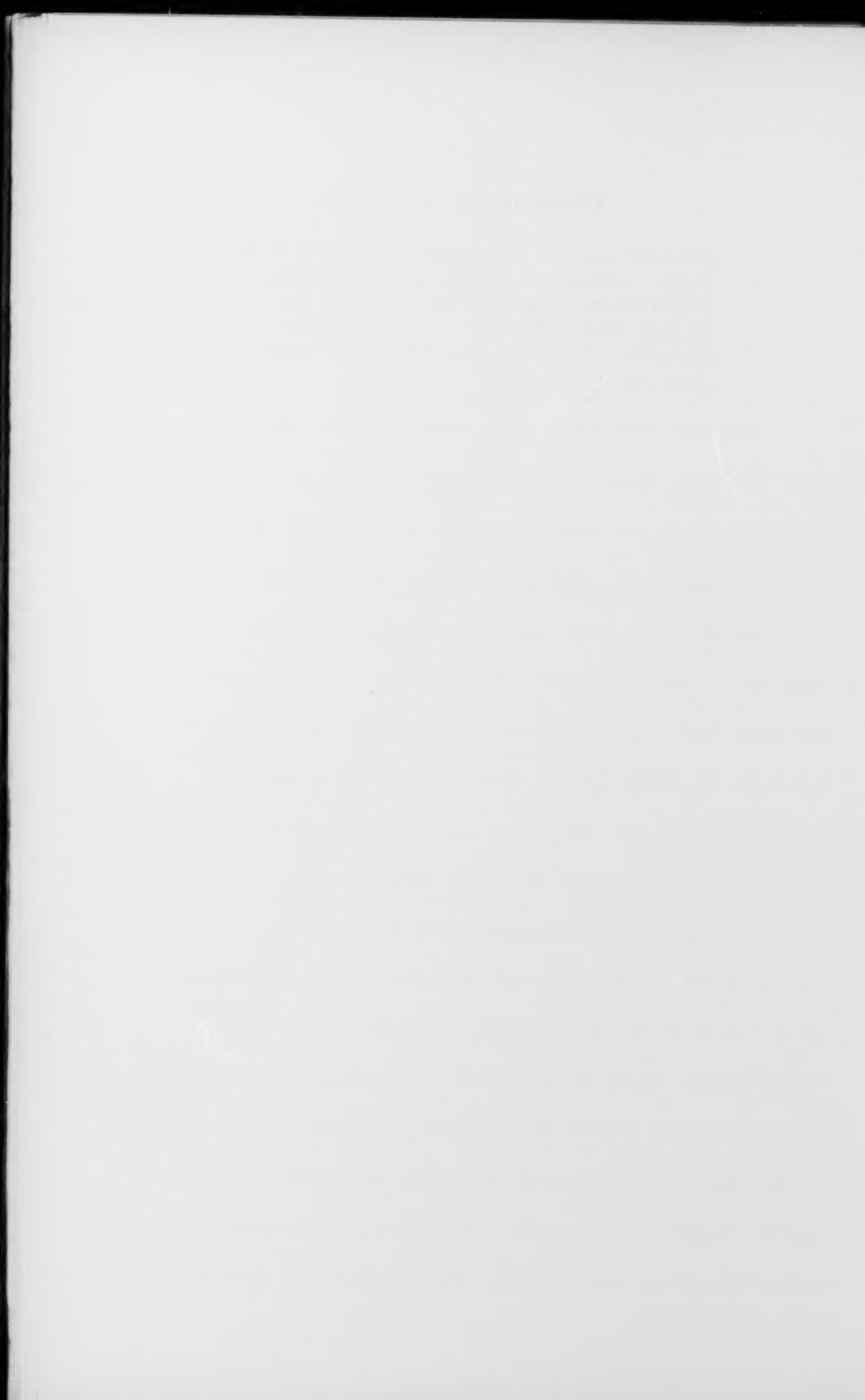


#### APPENDIX A-4

recognition of constitutional and other legal rights of children and parents. The legislature must certainly have intended to insure these rights to all children and parents coming in contact with juvenile justice.

Under the facts of this case, we also are of the opinion that the trial judges application of the "new" law was not error. Public Law 136, §59, Acts of 1978 (the Juvenile Code), in our opinion, requires its application to pending matters. The state of the record in this case shows no dispositional decree being entered by the trial court prior to October 1, 1979, thereby making the new Juvenile Code applicable.

When one considers the paramount interests of a natural parent in its child; the fact that the Welfare Department knew, or should have known, of impending procedural changes; Konar's motion to have the new code apply; and, the natural parent's statutory right under the new code to recant, we find that no error was committed in either



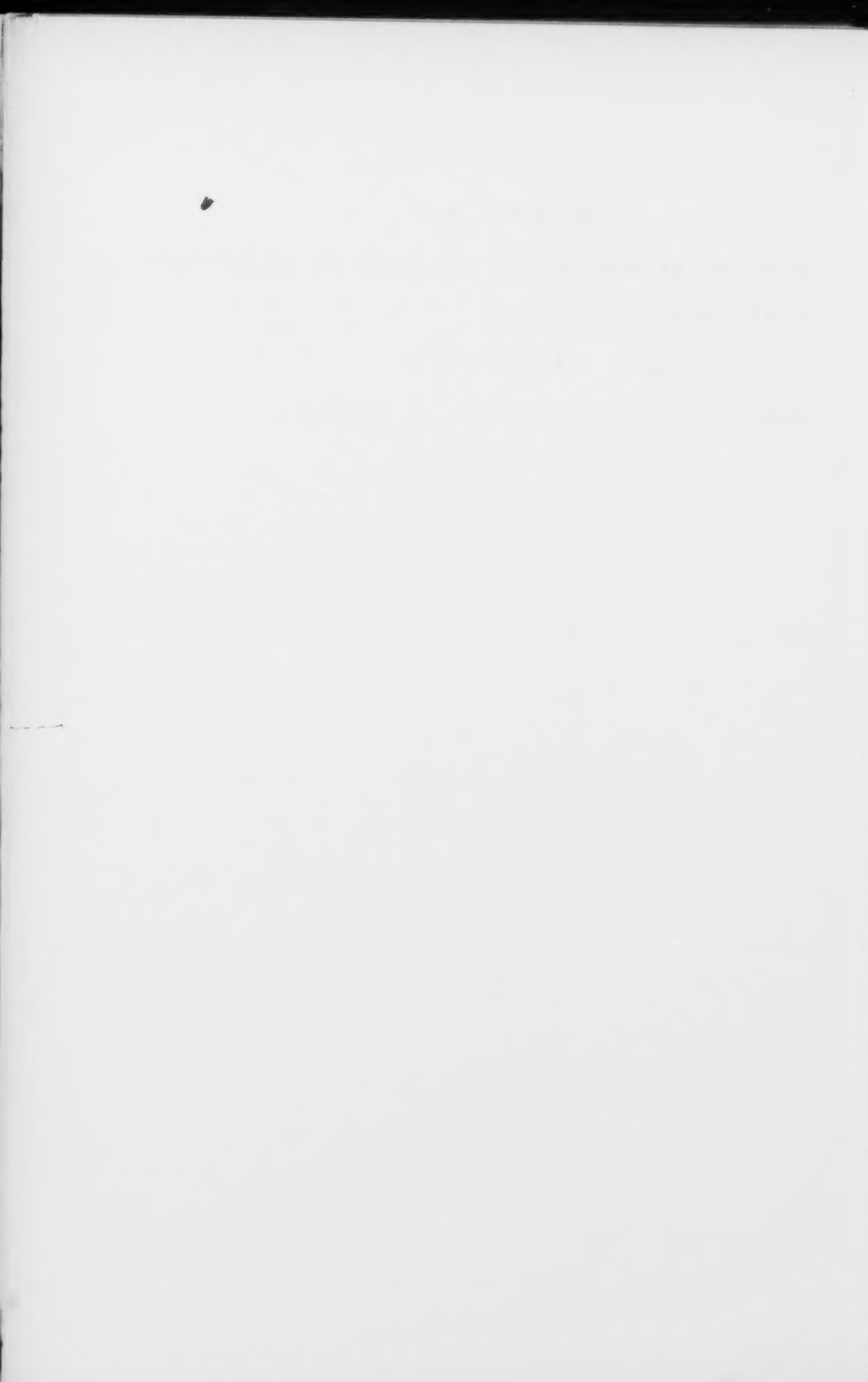


APPENDIX A-5

the law as applied or the lack of an evidentiary hearing thereon.

Judgment affirmed.

NEAL, P. J. and RATLIFF, J. Concur.



## APPENDIX B-1

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IN THE  
COURT OF APPEALS OF INDIANA  
FIRST DISTRICT

IN THE MATTER OF  
THE ADOPTION OF  
MALE INFANT KONAR

NANCY SIMPSON,

Respondent-Appellant,

**VS.**

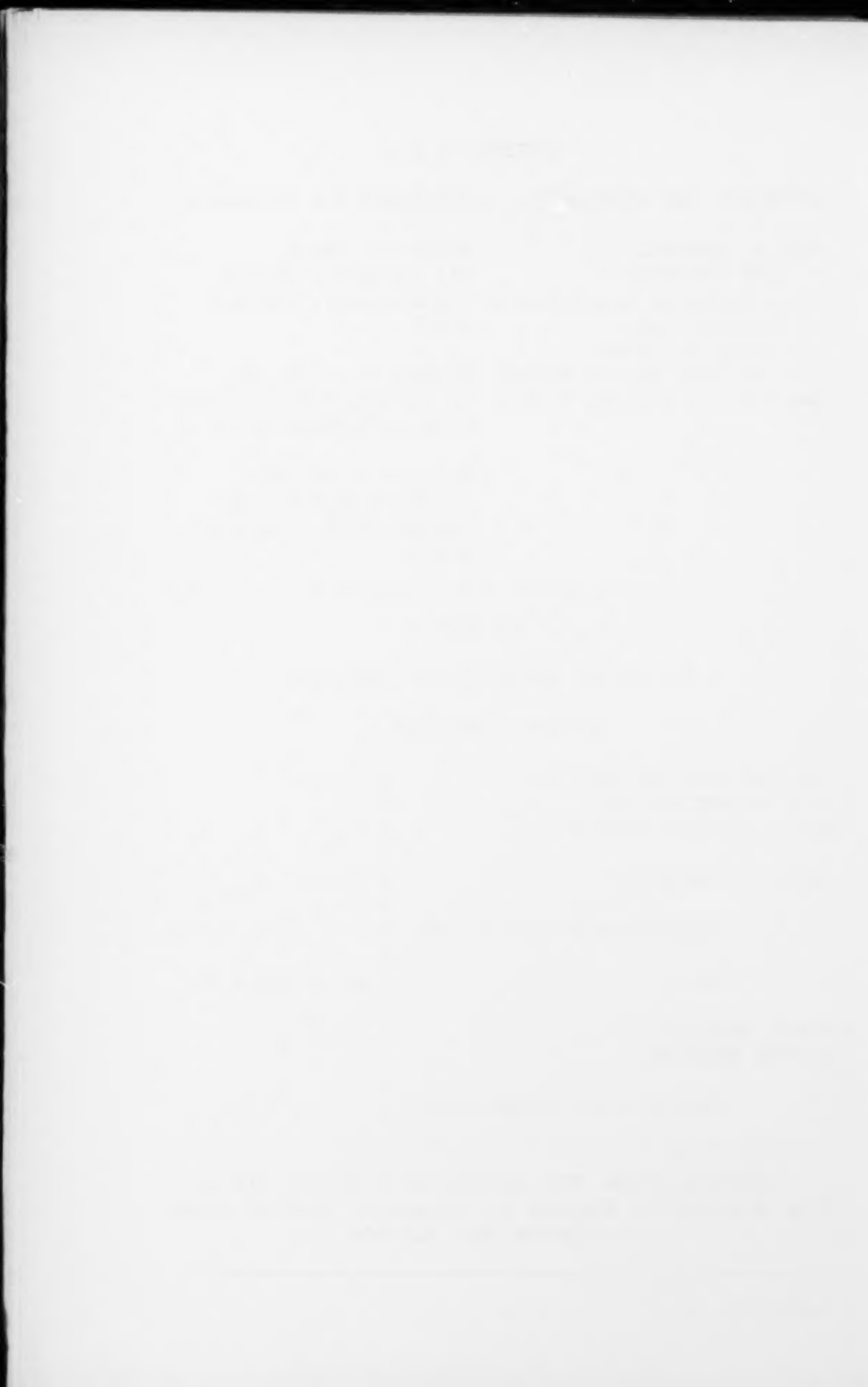
) No. 1-283 A 50

PAUL BEELER,  
LINDA BEELER,

Petitioner-Appellees. )

APPEAL FROM THE DEARBORN CIRCUIT COURT  
The Honorable Eugene A. Stewart, Special Judge  
(Cause No. A2-80)

RATLIFF, J.



## APPENDIX B-2

### STATEMENT OF THE CASE

Appellant Nancy Simpson appeals from an order of the Dearborn Circuit Court denying Simpson's motion to set aside an adoption decree. We affirm.

### FACTS

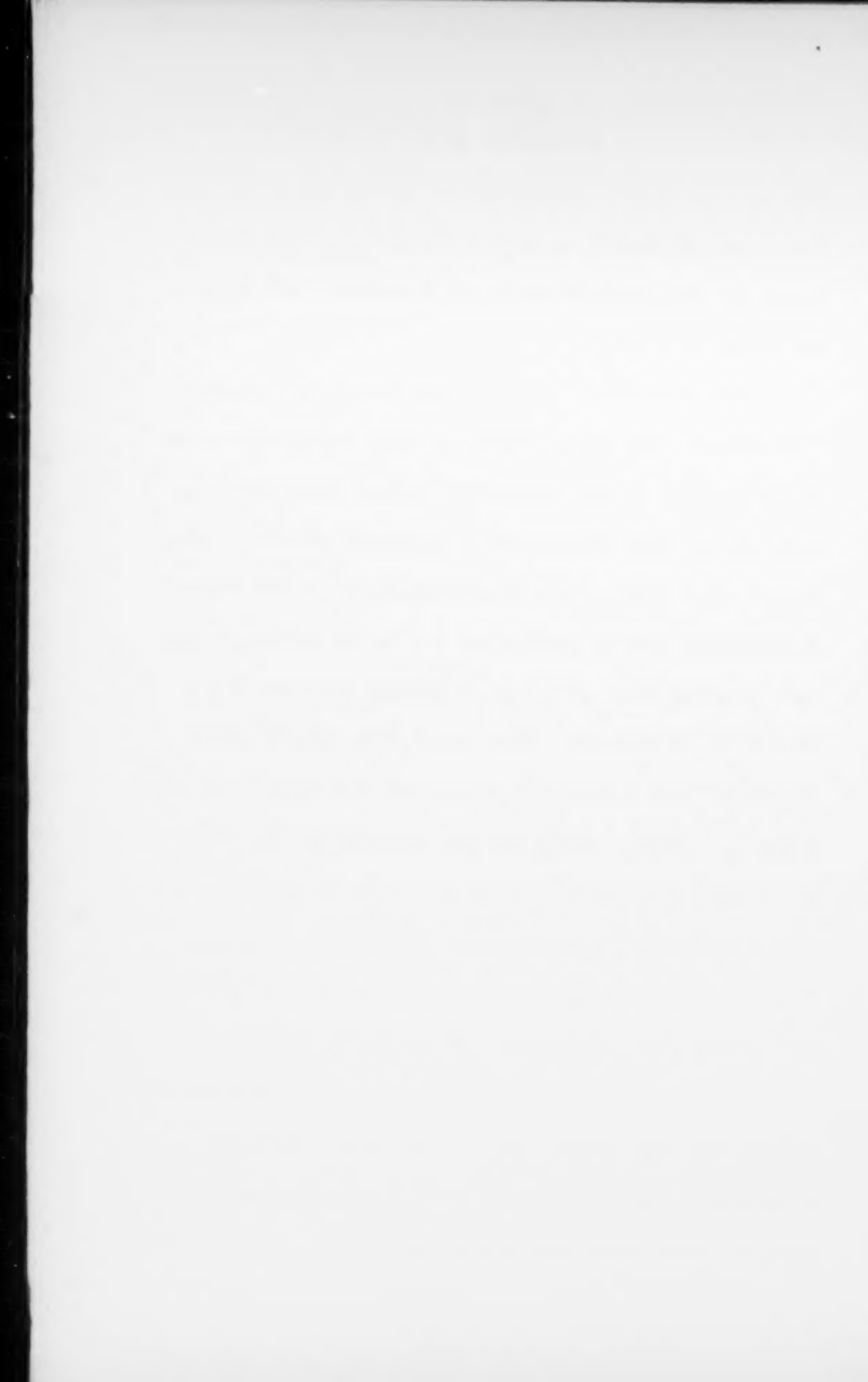
On April 16, 1979, Nancy Simpson (nee Konar) gave birth to an unnamed male infant. Two days later, Simpson signed a "Voluntary Termination or Relinquishment of Parental Rights" and a "Consent to Adoption". That same day, there was filed in the Washington Circuit Court a petition to make the child a ward of the Washington County Department of Public Welfare (DPW) and Simpson's waiver of notice, appearance, and consent to make the child a ward of DPW. On May 22, 1979, Simpson filed a habeas corpus complaint for the return of the child which had been placed with another family, the Beelers, appellees in this action. The DPW then filed a petition to terminate Simpson's parental rights



### APPENDIX B-3

which, in turn, prompted Simpson to file her "Notice of Rescission of Voluntary Termination or Relinquishment of Parental Rights" on June 27, 1979.

In December, 1979, the Beelers filed a "Petition for Adoption" in the Dearborn Circuit Court. The petition noted the pending action in the Washington Circuit Court. On April 23, 1980, the Washington Circuit Court dismissed DPW's petition to terminate parental rights and granted summary judgment in favor of Simpson. The Dearborn court then granted the Beelers' petition to adopt on June 2, 1980. This court subsequently affirmed the Washington court's dismissal of the Petition to terminate parental rights. Almost sixteen months after the grant of the petition for adoption, Simpson petitioned the Dearborn court to set aside the decree granting the adoption. The court denied Simpson's petition and it is from that denial that she now appeals.





## APPENDIX B-4

### ISSUE

Simpson raises two issues on appeal. However, we combine and rephrase her issues in order to narrowly address the precise issues in this case:

Does the natural mother's rescission of her voluntary termination of parental rights serve to rescind a separately signed consent for adoption, pursuant to which the child was, in fact, adopted?

### DISCUSSION AND DECISION

The trial court did not err in denying appellant's petition to set aside the decree of adoption.

Appellant's contentions on appeal revolve around the Dearborn court's failure to give Simpson notice of the adoption hearing. She contends that the failure to give such notice resulted in the court granting a void decree and further implicates due process concerns under the fourteenth amendment to the United States Constitution.



## APPENDIX B-5

Simpson's arguments are based upon her contention that her consent to the adoption had been previously invalidated. Because we determine that Simpson's consent to the adoption had not been invalidated, we conclude that Simpson's notice claims are without merit.

Simpson originally signed two documents immediately following the birth of her son. The first, a "Voluntary Termination or Relinquishment of Parental Rights", included the following language:

"Nancy Jean Konar, born on 9-7-59...the undersigned parent of Unnamed Male Infant Konar, born 4-16-79 hereby voluntarily and irrevocably relinquish all my rights as a parent with reference to said child, including, but not limited to, the right to control or consent to the adoption or receive notice of a hearing on petition for adoption for said child, and I do further transfer such parental rights to Washington (County Department of Public Welfare)...."

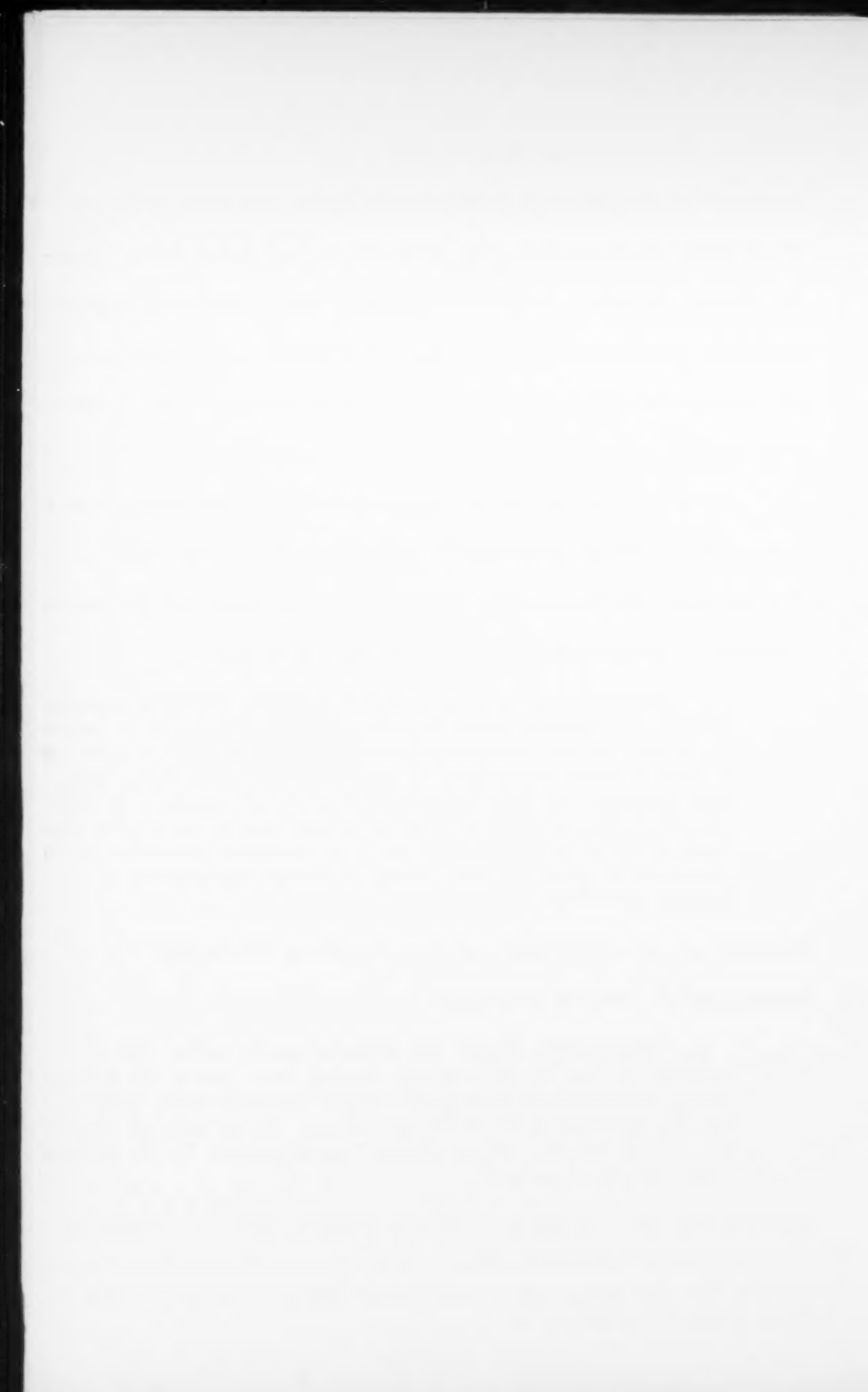
Record at 4. Simpson also signed a "Consent to Adoption"<sup>1/</sup> which stated:

"Nancy Jean Konar the undersigned, being the... parent having legal custody, being 19...years of age... hereby consent to the adoption of Unnamed Male Infant Konar, born on 4-16-79 by person(s) whose name(s) are not known to me. This consent is executed by me without coercion or duress."

Record at 4A. Simpson later attempted to withdraw

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<sup>1/</sup> The two documents were printed on opposite sides of the same sheet of paper.

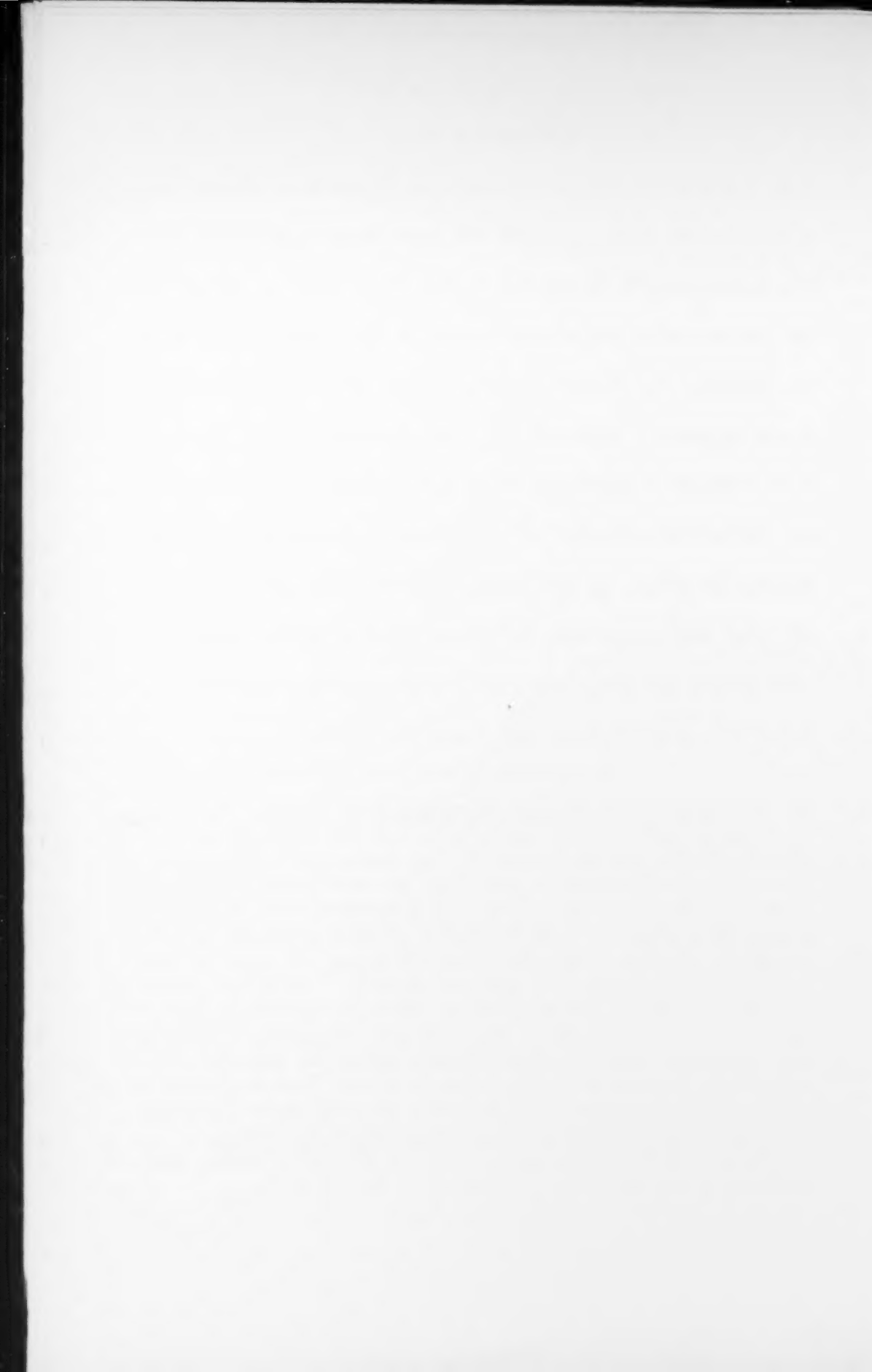


## APPENDIX B-6

her termination of parental rights. This withdrawal was upheld by the Washington Circuit Court when it dismissed DPW's petition to terminate parental rights and was affirmed on appeal by this court. For purposes of this appeal, therefore, we assume that Simpson did indeed withdraw her voluntary termination of parental rights.<sup>2/</sup> However, Simpson apparently argues, a fortiori, that her rescission of the termination of parental rights also operated to rescind her separately-signed consent to adoption. We cannot agree.

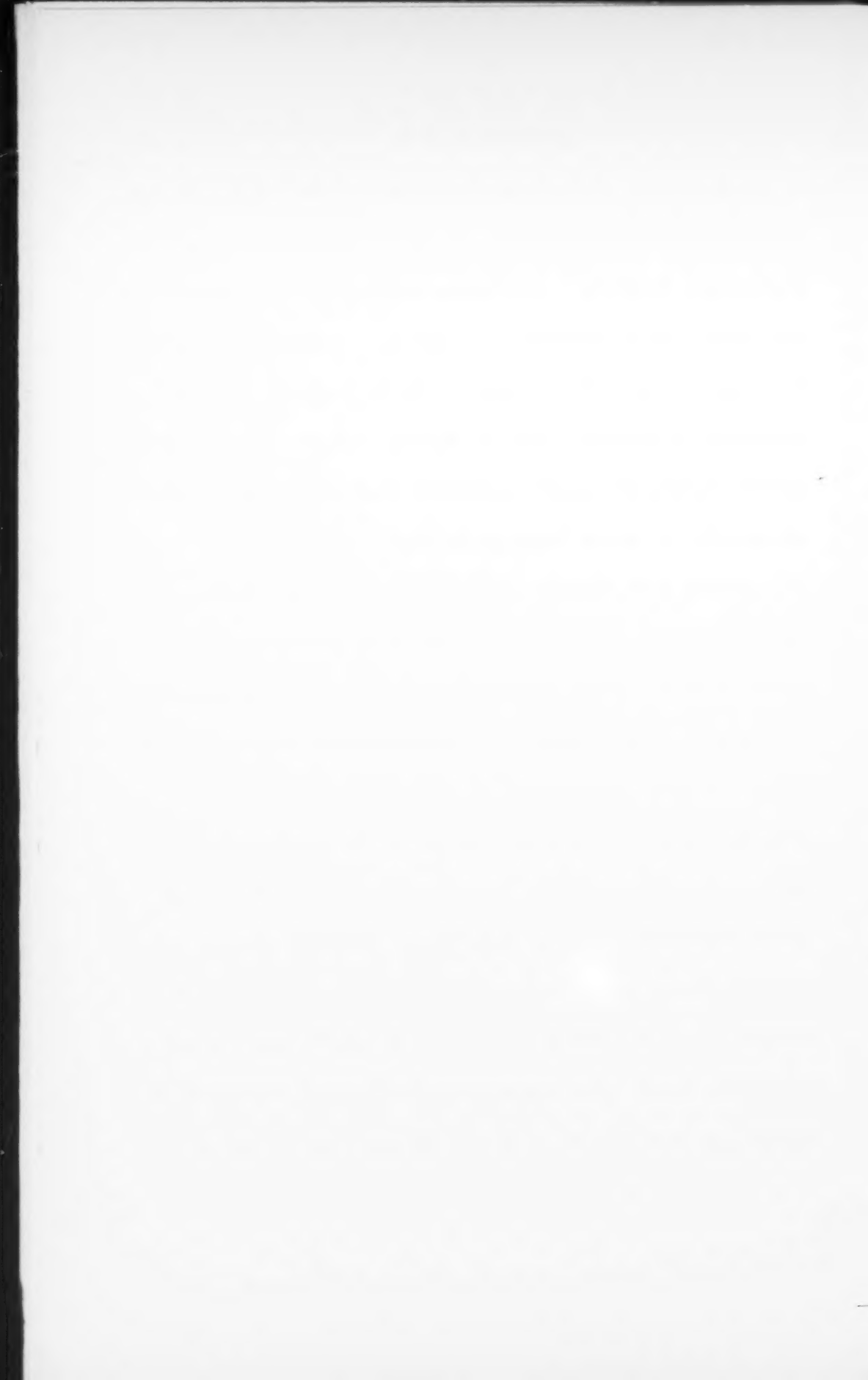
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<sup>2/</sup> In Washington County Department of Public Welfare v. Konar, (1981) Ind. Appl, 416 N.E.2d 1334, this court upheld the decision of the Washington Circuit Court dismissing DPW's petition to terminate parental rights. The circuit court had dismissed the petition based upon Simpson's withdrawal of her termination of parental rights. Our decision in Konar is part of the law of the case in the instant appeal. However, insofar as our prior opinion might tend to indicate that parents consenting to a termination of parental rights may withdraw that consent at any time, we hereby expressly overrule Konar. It is clear that a parent's ability to withdraw such consent is extremely limited. See Snyder v. Shelby County Department of Public Welfare, (1981) Ind. App., 418 N.E.2d 1171, 1180, and Indiana Code sections 31-6-5-2, 3 (1982).



## APPENDIX B-7

Simpson filed a "Notice of Rescission of Voluntary Termination or Relinquishment of Parental Rights" in response to DPW's petition to terminate parental rights. The Washington Circuit Court dismissed DPW's petition and entered judgment for Simpson based upon its determination that Simpson had rescinded her parental rights termination. This court affirmed the trial court's decision. However, neither the Washington Circuit Court nor this court considered the separately-signed consent to adoption in addressing the rescission of the parental rights termination. Therefore, we cannot agree with appellant's contention that the rescission of the voluntary termination of parental rights also operated as a rescission of the consent to adoption. Nowhere in the proceedings is it evident that the separately-signed consent to adoption was ever even considered to be a





## APPENDIX B-8

to be a part of the dispute.<sup>3/</sup>

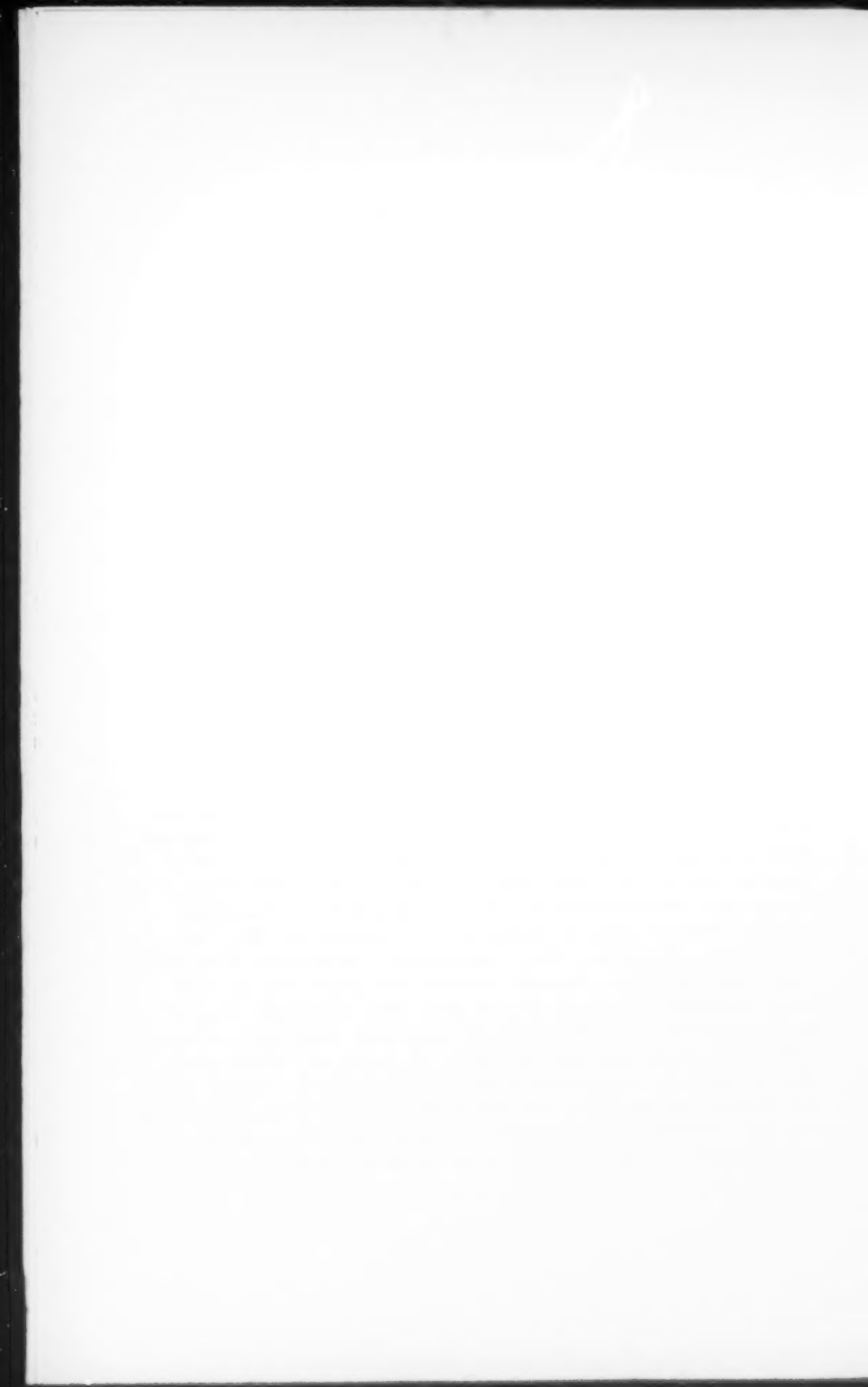
Our conclusion, that the consent to adoption was not vitiated by the rescission of the termination of parental rights, is supported by the language of Indiana Code section 31-3-1-6(f) (1982) which states:

"A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal."

Section 6(f) provides the exclusive means by

---

<sup>3/</sup> Appellant contends that because her answer admitted rhetorical paragraph four of DPW's "Petition for Termination of Parental Rights", the consent to adoption was automatically made an issue in dispute. Paragraph four states "(t)hat the natural mother of said child heretofore on the 18th day of April, 1979 executed a "Voluntary Termination or Relinquishment of Parental Rights and Consent to Adoption". Record at 58. We also note, however, that rehtorical paragraph five of the same petition states "(t)hat it would be in the best interests of the child that the parental rights be terminated, in order to facilitate adoption, when adoptive opportunities arise". Id. It is clear that DPW sought to terminate Simpson's parental rights. We cannot agree that the mere mention of the existence of the consent to adoption, without anything more, is sufficient to have placed the consent to adoption at issue.



## APPENDIX B-9

which a consent to adoption may be withdrawn prior to the entry of a final decree of adoption. However, Simpson has failed to indicate that such a procedure was involved in the instant case. Absent such an indication, we cannot say that the separately-signed consent to adoption had been rescinded.<sup>4/</sup>

Because we determine that Simpson had not rescinded her consent to adoption, we must conclude that her notice claims are without merit. Indiana Code section 31-3-1-6(h) (1982) states that "(n)otice of hearing on a petition for adoption need not be given to a person whose consent has been filed with the petition. ..." It is undisputed that Simpson's signed consent to adoption was made a part of the petition for adoption submitted

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<sup>4/</sup> Simpson also argues that because the termination of parental rights included a revocation of "the right to control or consent to the adoption", record at 4, the rescission of the termination of parental rights reinstated the natural mother's right to withhold consent for the adoption. For the reasons stated above, we cannot agree. See Ind. Code §31-3-1-6(f) (1982).



APPENDIX B-10

to the Dearborn Circuit Court. In light of the express language of section 6(h) we cannot say that the adoption court erred in failing to give Simpson notice of the proceedings.<sup>5/</sup> Accordingly, we cannot say that the court committed error in denying Simpson's motion to set aside the adoption decree and we, therefore, affirm the decision of the lower court.

Affirmed.

ROBERTSON, P.J. and NEAL, J., concur.

---

<sup>5/</sup> We note that the petition for adoption stated "that there is presently a civil proceeding in the Circuit Court of Washington County, Indiana known as Cuase (sic) No. 79-A-83 wherein the natural mother of said child is seeking to revoke her consent to the adoption of this child". Record at 2. While we do not condone the granting of an adoption where the court is made aware of such circumstances, neither are we inclined to find reversible error where the consent to adoption was not actually rescinded. We are also unimpressed with Simpson's argument that the language of Beeler's petition for adoption supports her contention that the consent to adoption was rescinded by the rescission of the voluntary termination of parental rights in the prior case. Beeler's understanding of what occurred in the previous case is not binding upon this court's determination of what acutally occurred.



APPENDIX C-1

STATE OF INDIANA

INDIANAPOLIS, 46204

Clerk of the Supreme Court  
and Court of Appeals

Telephone 232-1930

MARJORIE H. O'LAUGHLIN, CLERK  
217 State House

No. 1-283A50

Nancy Simpson V

Paul Beeler, et al

You are hereby notified that the Court of  
Appeals has on this day denied Appellant's  
Petition for Rehearing.

Buchanan, C. J.

Please adcknowledge receipt of this notice in order  
that our records may show that you have been  
notified of this action.

WITNESS my name and the seal of said Court,

this 29th day of November, 1983

/s/ Marjorie H. O'Laughlin  
Clerk Supreme Court and Court of Appeals

November 29, 1983 db

No. 1-283A50

I hereby acknowledge receipt Suzanne Philbrick  
of the above notice Chesterton





APPENDIX C-2

William R. Wilson, Lawrenceburg

Bobby Jay Small, Indianapolis

Richard P. Good, JR. Cicero

Attorney for \_\_\_\_\_



APPENDIX D-1

STATE OF INDIANA

INDIANAPOLIS, 46204

Clerk of the Supreme Court  
and Court of Appeals

Telephone 232-1930

MARJORIE H. O'LAUGHLIN, CLERK  
217 State House

No. 1-283A50

In Adoption of Male Infant Konar, Nancy  
Simpson v. Paul Beeler et al

You are hereby notified that the Supreme  
Court

has on this day Appellant's (Nancy Simpson)  
petition to Transfer to Supreme Court is  
hereby denied. Hunter, A.D.J.

All Justices Concur.

Please acknowledge receipt of this notice in order  
that our records may show that you have been  
notified of this action.

WITNESS my name and the seal of said Court

this 17th day of Feb, 19 84

/s/ Marjorie H. O'Laughlin  
Clerk Supreme Court and Court of Appeals

-----  
No. 2/17/84 jm TD 1-283A50

Richard P. Good, Jr., Cicero



APPENDIX D-2

I hereby acknowledge receipt  
of the above notice

\_\_\_\_\_  
Signature

Date \_\_\_\_\_, 19\_\_\_\_

Attorney for      Appellant

Appellee

Bobby Jay Small, Indpls.  
William R. Wilson,  
Lawrenceburg  
Suzanne Philbrick,  
Chesterton



APPENDIX E-1

IN THE CIRCUIT COURT  
FOR WASHINGTON COUNTY  
STATE OF INDIANA

IN THE MATTER OF UNNAMED MALE  
INFANT KONAR, A CHILD UNDER 79-J-25  
EIGHTEEN YEARS

ORDER ON MOTION TO DISMISS  
PETITION TO TERMINATE PARENTAL RIGHTS

Comes now the Petitioner/Respondent herein, Nancy J. Konar, in person and by her attorney, Dafid P. Allen, and comes now the Respondent/Petitioner, Washington County Department of Public Welfare, by their attorney, John W. Mead, for hearing on the Petition of Nancy J. Konar to dismiss the Petition of the Washington County Department of Public Welfare to terminate the parental rights of Nancy J. Konar and James W. Warnock, Jr., the putative father, to said minor child. And the Court having heard the argument of counsel and having had the said matter under advisement, now makes the





## APPENDIX E-2

following findings of fact:

1. That on the 18th day of April, 1979, the Respondent/Petitioner herein, Nancy J. Konar, at the request of agents of the Washington County Department of Public Welfare executed a document entitled Consent to Termination of Parental Rights, which said document was attached to the Petitioner's Complaint herein.

2. That thereafter on the 8th day of June, 1979, the Petitioner herein filed its Petition to Terminate the Parental rights of the mother and putative father herein.

3. That thereafter the Respondent/natural mother, Nancy J. Konar, filed in this Court on 27th day of June, 1979, her Recision of Consent to Terminate Parental Rights and thereafter filed her motion to dismiss said petition to terminate her parental rights.

And having made the above findings of fact, the Court now makes the following



APPENDIX E-3

conclusions of law:

1. That the law of the State of Indiana applicable to this case provides that a parent consenting to the termination of his or her parental rights can revoke said consent at any time prior to and at the final hearing on said petition.

And having determined said conclusion of law, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That the Petition of the Washington County Department of Public Welfare to terminate the parental rights of the Respondent, Nancy J. Konar, in the minor child born to the said Nancy J. Konar on the 16th day of April, 1979, is hereby dismissed and summary judgment is hereby rendered in favor of the Respondent, Nancy J. Konar.

Dated: April 23, 1980.

/s/ Harry S. Paynter

HARRY S. PAYNTER, SPECIAL JUDGE,  
WASHINGTON CIRCUIT COURT



APPENDIX F-1

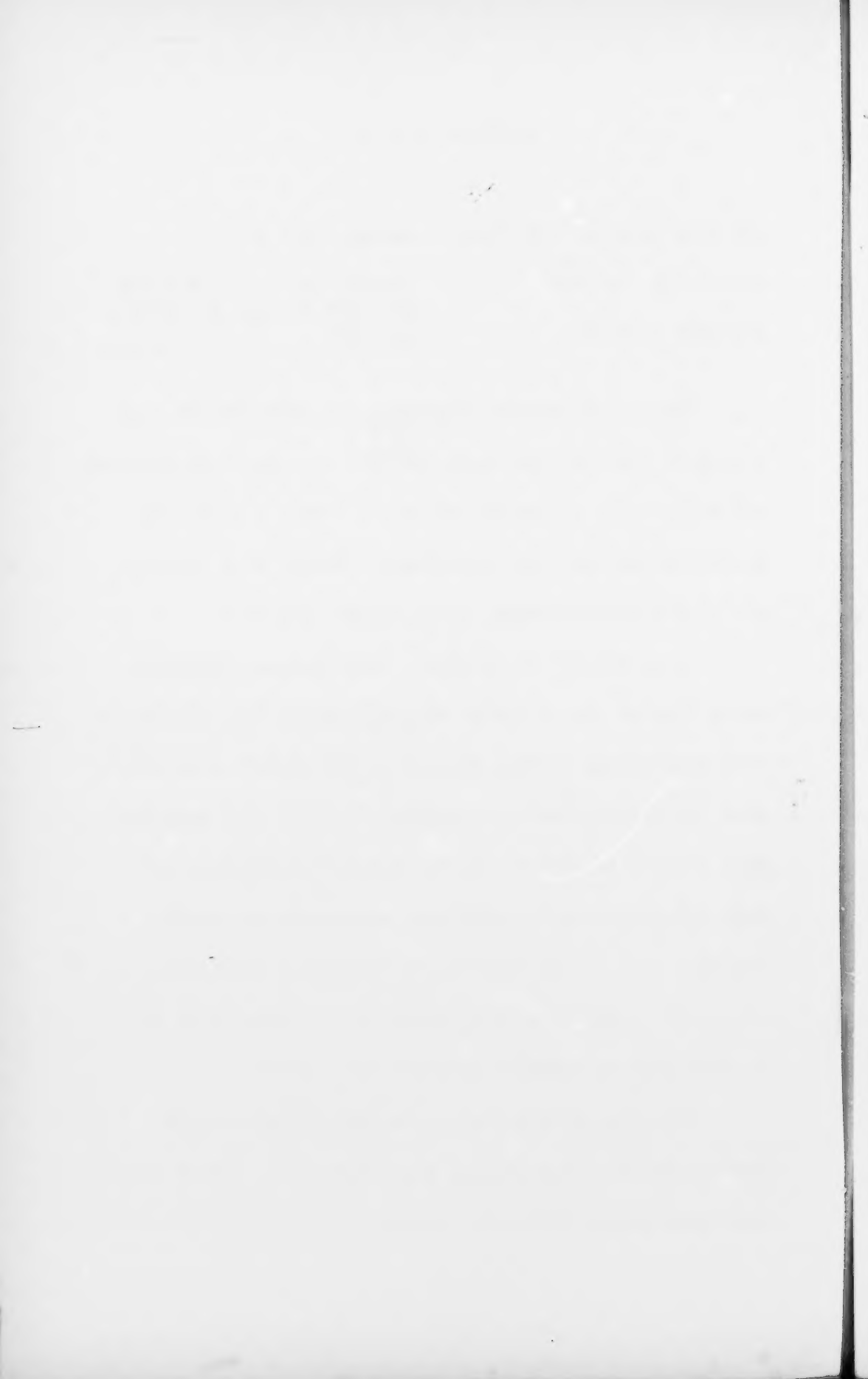
IN THE MATTER OF THE)	Cause No. A2-80.
)	
ADOPTION OF MALE )	ORDER DENYING MOTION
)	TO SET ASIDE ADOPTION
INFANT KONAR )	<u>DECREE</u>

Nancy Simpson appears in person and by counsel on her Motion to Set Aside the Decree of Adoption entered herein. The adopting parents appear by counsel. From the record of the proceedings, the Court finds:

1) Nancy J. Konar, now Nancy Simpson, gave birth to a male child April 16, 1979, and two days later filed a document whereby she relinquished parental rights and waived her right to consent or receive notice of any adoption proceedings concerning such child, all in Washington County, Indiana;

2) the child's natural father signed a similar document August 10, 1979;

3) the adopting parents filed their Petition for Adoption December 14, 1979 in the Dearborn Circuit Court;



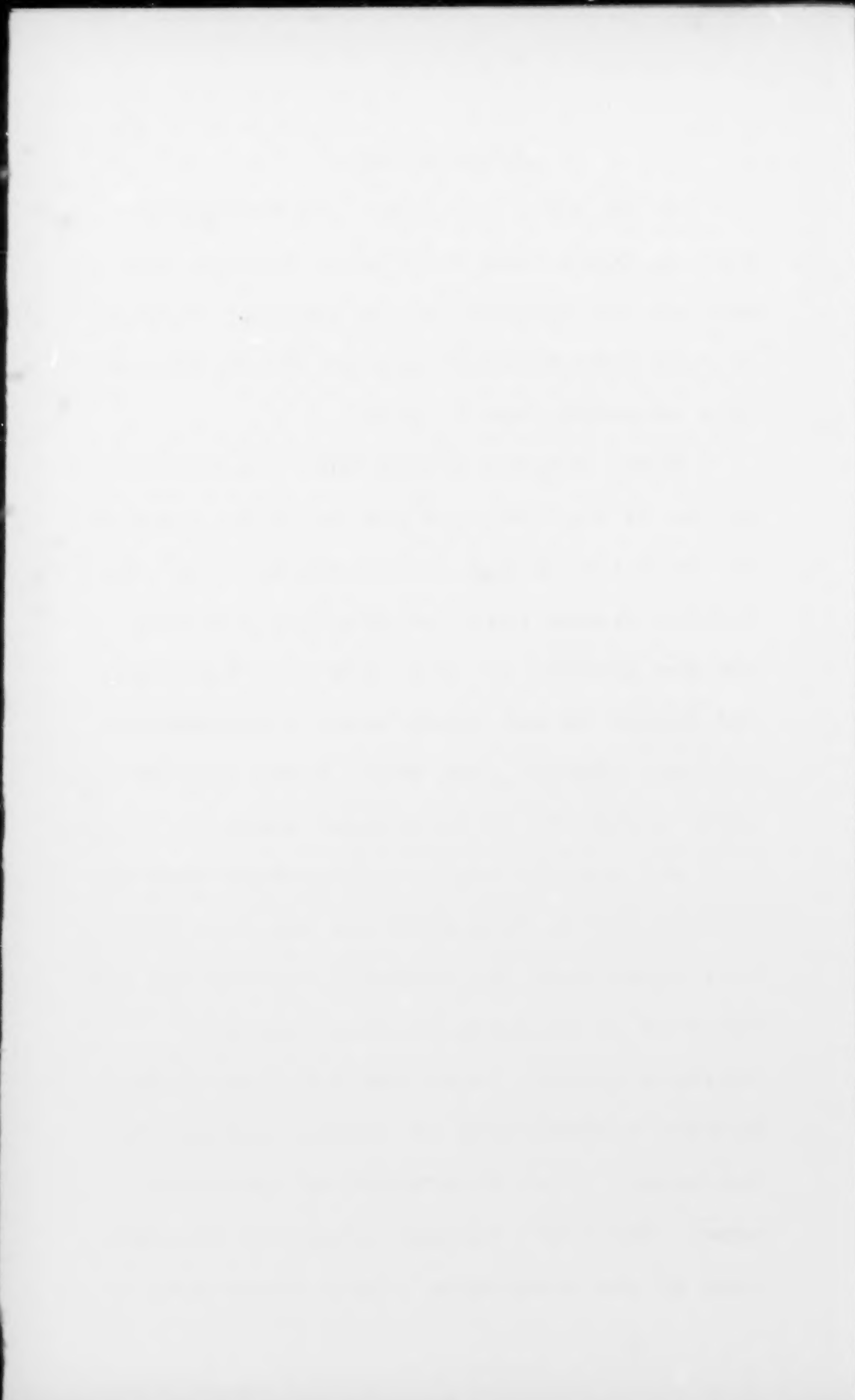
## APPENDIX F-2

4) on April 23, 1980, the Washington Circuit Court held that Nancy Simpson had revoked her consent to the adoption herein;

5) the Dearborn Circuit Court granted this adoption June 2, 1980.

Nancy Simpson argues that the Adoption Decree is void because she received no notice of the Petition and subsequent hearing. She further argues that the adoption violates the due process clause of the 14th Amendment and should be set aside under a fundamental fairness theory. The Court finds both of these arguments to be without merit.

Ms. Simpson overlooks the fact that her consent was on file with the Dearborn Circuit Court when the adoption hearing was had. There is no evidence to show that the Dearborn Circuit Court was notified of Ms. Simpson's withdrawal of consent and of the subsequent Court determination upholding same. The Court further notes the proceedings by the Washington County Department of





APPENDIX F-3

Public Welfare wherein the child adopted herein was declared neglected and dependent and duly placed for adoption.

The constitutional argument is similarly based upon the notice issue, and there being nothing before the Dearborn Circuit Court except the various consents of Ms. Simpson, there is no showing that proper statutory procedure was not followed in granting the adoption.

Accordingly, Nancy Simpson's Motion to Set Aside the Decree of Adoption is overruled and denied.

IT IS SO ORDERED, this 5th day of January, 1983.

/s/ Eugene A. Stewart  
EUGENE A. STEWART, SPECIAL JUDGE  
DEARBORN CIRCUIT COURT

SEP 19 1984

ALEXANDER L. STEVAS  
CLERK

**BEST AVAILABLE COPY**

IN THE

# Supreme Court of the United States

October Term, 1984

IN THE MATTER OF THE ADOPTION  
OF MALE INFANT KONAR, NANCY SIMPSON,

*Petitioner,*

v.

PAUL BEELER, LINDA BEELER,

*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF INDIANA,  
FIRST DISTRICT

---

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO COURT  
OF APPEALS OF INDIANA,  
FIRST DISTRICT

---

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*Attorney of Record for Respondents*

RICHARD P. GOOD, JR.  
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(317) 232-1836

## **QUESTIONS PRESENTED FOR REVIEW**

Respondents cannot accept Petitioner's statement of the Questions Presented For Review because those issues were not decided by the Court below and are not supported by the record.

The questions for review are:

1) Did the Court below decide any federal question when it held that the "consent to adoption" executed by Petitioner and filed with the Petition for Adoption had never been withdrawn?

2) Did the Court below decide any federal question when it held that a rescission of a "Voluntary Termination of Parental Rights" does not, under Indiana law, operate to withdraw a separately signed "consent to adoption" pursuant to which the child was, in fact, adopted?

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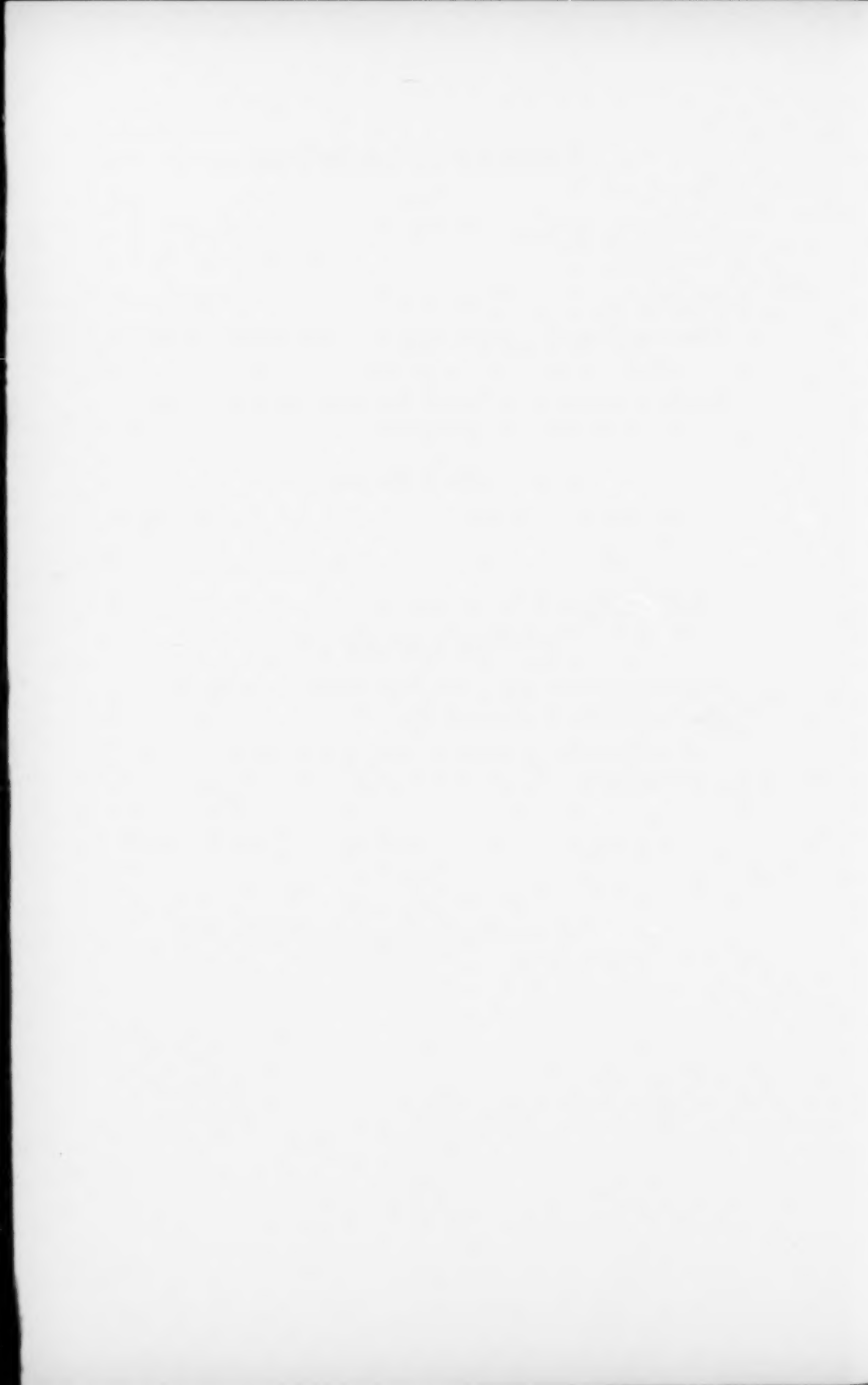
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No. 83-1902

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IN THE  
**Supreme Court of the United States**

October Term, 1984

IN THE MATTER OF THE ADOPTION  
OF MALE INFANT KONAR, NANCY SIMPSON,

*Petitioner,*

v.

PAUL BEELER, LINDA BEELER,

*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE COURT OF APPEALS OF INDIANA,  
FIRST DISTRICT**

---

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI TO COURT  
OF APPEALS OF INDIANA,  
FIRST DISTRICT**

---

Respondents, Paul and Linda Beeler, respectfully  
request this Court to deny the issuance of a writ of

certiorari to the Court of Appeals of Indiana, First District, thereby refusing to review the decision below.

### **OPINION BELOW**

Respondent cannot accept the statements under Opinion Below in the Petition. Petitioner states that in an earlier opinion the Court below:

“affirmed the decision of the Washington Circuit Court of Indiana that the Petitioner had, in fact, *legally revoked her consent to adoption.*”

Petitioner has mistated the holding in that case. The case discussed in the Opinion Below is reported at 416 N.E.2d 1334 and is included as Appendix A in the Petition.

The opinion below to which the Petition is addressed is reported at 454 N.W.2d 886 and is included as Appendix B in the Petition.

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED**

In addition to those set forth in the Appendix to the Petition, the following statutes are involved and are set forth in the appendix to this Brief:

1) The statute regulating consent to adoption, withdrawal of consent and notice to natural parents, compiled in Title 31, Book 1, West's Annotated Indiana Code (1979 Ed.), pages 553-555.

2) The statute regulating Voluntary Termination of Parental Rights, Title 31, Book 2, West's Annotated Indiana Code (1979 Ed.), pages 210-211.

### **STATEMENT OF THE CASE**

Respondents cannot accept Petitioner's Statement of the Case because it contains several statements that are not supported by the facts determined from the record by the Court below. The following statements are inaccurate:



"Through these documents the issues of right to consent to the adoption and the right to receive notice of adoption proceedings were raised." (Pet. p. 4)

"In both the Petition and the Answer the issues of consent to adoption and the right to receive notice of an adoption proceeding were raised." (Pet. p. 5)

"The Court thereby reinstated Ms. Simpson's right to receive notice of adoption proceedings and the right to consent to adoption." (Pet. p. 5-6)

These three statements are not Statements of the Case. They are arguments. In the opinion below the Court determined that none of these three statements was supported by the record.

The recitation of the Facts from the opinion below present a concise and accurate statement of the case, as follows:

On April 16, 1979, Nancy Simpson (nee Konar) gave birth to an unnamed male infant. Two days later, Simpson signed a "Voluntary Termination or Relinquishment of Parental Rights" and a "Consent to Adoption". That same day, there was filed in the Washington Circuit Court a petition to make the child a ward of the Washington County Department of Public Welfare (DPW) and Simpson's waiver of notice, appearance, and consent to make the child a ward of DPW. On May 22, 1979, Simpson filed a habeas corpus complaint for the return of the child which had been placed with another family, the Beelers, appellees in this action. The DPW then filed a petition to terminate Simpson's parental rights which, in turn, prompted Simpson to file her "Notice of Rescission of Voluntary Termination or Relinquishment of Parental Rights" on June 27, 1979.

In December, 1979, the Beelers filed a "Petition for Adoption" in the Dearborn Circuit Court. The petition noted the pending action in the Washington Circuit Court. On April 23, 1980, the Washington Circuit

Court dismissed DPW's petition to terminate parental rights and granted summary judgment in favor of Simpson. The Dearborn court then granted the Beelers' petition to adopt on June 2, 1980. This court subsequently affirmed the Washington court's dismissal of the Petition to terminate parental rights. Almost sixteen months after the grant of the petition for adoption, Simpson petitioned the Dearborn court to set aside the decree granting the adoption. The court denied Simpson's petition and it is from that denial that she now appeals.

(Appendix to Petition at B)

The Court of Appeals of Indiana, in a unanimous opinion, affirmed the Dearborn Circuit Court's denial of the Petition to set aside the decree. Thereafter the Supreme Court of Indiana unanimously denied a petition for transfer, without opinion.

### SUMMARY OF ARGUMENT

1) The Court below did *not* hold that an adoption proceeding without notice and *without consent* satisfies due process concerns. The question presented for review by Petitioner was not decided by the Court below. Indiana law requires notice to the natural parent, *unless a consent to adoption is filed* with the adoption petition. The Court below merely determined that a valid consent to adoption was executed by the Petitioner, the consent was filed with the adoption proceeding, and the consent was never withdrawn. Therefore, notice to the natural parent is not required. The question for review presented in the Petition was clearly not decided by the Court below. Petitioner's entire argument is predicated on the erroneous assumption that her consent had been withdrawn prior to the adoption.

2) The opinion below rests *solely* upon an interpretation of two separate state statutory schemes. The interpretation given to those Indiana statutes does not implicate any due process concerns. The Court determined that withdrawal

of a consent to adoption is governed exclusively by the provisions in the adoption statute specifically addressed to withdrawal of consent to adoption. I.C. 31-3-6-1(f). There are separate and distinct statutes governing voluntary termination of parental rights proceedings. I.C. 31-6-5-2.

A mere change of mind and notice to the court that a consent to voluntary termination of parental rights has been rescinded is sufficient to halt a voluntary termination proceeding. However, under the adoption code, a consent to adoption may only be withdrawn after petitioning the court for an order, giving notice and opportunity to be heard to the adopting parents, and establishing that the withdrawal of consent is in the best interests of the child. The court determined that a rescission of a consent to voluntary termination of parental rights does not operate to rescind a separate consent to adoption. The two concepts are two separate and distinct legal concepts governed by different standards and procedures.

3) The Petition is simply a request to have this Court redetermine a question of fact resolved by the Court below. Was the Petitioner's consent to adoption ever withdrawn? The Court determined from the record below that a valid consent to adoption was filed with the petition and it was never withdrawn. The record clearly supports that finding. As a general rule this Court will not exercise its jurisdiction to review a decision on a question of fact. This case does not come within any of the exceptions to that general rule.

## **REASONS WHY THE WRIT SHOULD BE DENIED**

### **I.**

## **NEITHER THE DISCUSSION BELOW NOR THE COMMON LAW RECORD SUPPORT THE QUESTIONS PRESENTED IN THE PETITION FOR REVIEW**

The Court of Appeals of Indiana did not hold that an

adoption proceeding *without the consent of the natural parent* and without notice satisfies due process of law.

On the contrary, the Court of Appeals of Indiana merely decided that notice was not required because there was a valid consent to adoption filed with the adoption petition. Indiana law does not allow an adoption to be obtained without notice to the natural parent unless there is either a termination of parental rights or consent.<sup>1</sup>

The issue decided was whether the "consent to adoption" exception was properly relied upon in this case.

The Court of Appeals of Indiana determined that:

a) A valid "consent to adoption" executed by Petitioner was filed in the court hearing the adoption proceeding;

b) The "consent to adoption" had never been withdrawn;

c) Notice to a natural parent of an adoption proceeding is not required if a valid "consent to adoption" is filed in the court hearing the adoption;

d) Prior litigation between Petitioner and the Department of Public Welfare involved only a rescission of the "voluntary termination of parental rights" and the separate and distinct issue of a request to withdraw consent to adoption was not before the trial court or the Court of Appeals in that case; and

e) Since Petitioner's "due process" claims were predicated on an erroneous theory that the rescission of her consent to a voluntary termination of parental rights operated as a withdrawal of "consent to adoption" the claim was without merit.

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<sup>1</sup> I.C. 31-3-1-6(h) provides:

(h) Notice of hearing on a petition for adoption need not be given to a person *whose consent has been filed with the petition* or whose consent is not required by subdivision (g)(3) or (g)(4) of this section. (Emphasis supplied.)

[Opinion Below, Appendix to Petition at pages B-9; B-8, 9; B-9; B-7, 8; and B-9 respectively.]

The decision below clearly did not raise or decide the due process issue presented in the Petition. The issue decided by the Court below is succinctly stated in the opinion below as follows:

“Does the natural mother’s rescission of her voluntary termination of parental rights serve to rescind a separately signed consent to adoption, pursuant to which the child was, in fact, adopted?”  
[Opinion Below, Appendix to Petition at page B-4.]

In resolving the issue, the Court below based its decision solely upon Indiana’s statute regulating withdrawal of consent to adoption, I.C. 31-3-1-6(f) (A-4) and Indiana statutes regulating termination of parental rights proceedings. I.C. 31-6-5-2 (A-1).

Indiana law does not permit an adoption without notice *and without consent*, and the Court below did not so hold.

The Question for Review set forth in the Petition was clearly not decided by the Court below and is not supported by the record. Therefore the Petition should be denied.

## II.

### THE DECISION BELOW WAS BASED SOLELY UPON AN INTERPRETATION OF INDIANA STATUTES. THAT INTERPRETATION DID NOT IMPLICATE THE DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT

The Court of Appeals of Indiana held that Petitioner did not follow the statutory procedure for withdrawing her previously executed consent to adoption. The Court held that Indiana Code section 31-3-1-6(f) provides the exclusive means by which a consent to adoption may be withdrawn and that Petitioner did not follow that procedure. Ind. Code 31-3-1-6(f) states:

(f) A consent to adoption may be withdrawn after entry of the decree of adoption. A consent to adoption may not be withdrawn prior to the entry of the decree of adoption *unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.* (Emphasis supplied.)

Indiana courts, consistent with the majority of states, have long held that if consent to adoption is voluntarily executed by natural parents, such parents are bound by the consequences which the law attaches and that there is no automatic right to withdraw that consent. *Emmons v. Dinnilli* 235 Ind. 249, 133 N.E.2d 5 (1956); *Matter of Snyder*, — Ind. App. —, 418 N.E.2d 1171 (1981). See generally Annotation "Right to withdraw consent to adoption" 74 ALR 3d 421.

Thus, in Indiana, as in the majority of states, a person seeking to withdraw consent to adopt must:

- 1) Petition the Court for an order to withdraw consent;
- 2) Give notice to the adoptive parents of the petition to withdraw consent;
- 3) Provide the adoptive parents an opportunity to be heard; and
- 4) Persuade the Court that it is in the best interest of the child that consent be withdrawn.

The Court below determined that Petitioner did not even initiate these proceedings, let alone meet her burdens under the statute.

While the Indiana adoption code imposes substantial burdens on a party seeking to perfect a withdrawal of a consent to adoption, Ind. Code 31-3-1-6(f), *supra*, there are no similar constraints under the procedures governing rescission of a voluntary termination of parental rights.



Ind. Code 31-6-5-2. (A-1) As is evident from the decision in the related *Washington County* case, (Appendix to Petition at A), a mere change of mind conveyed to the Court before the voluntary termination proceedings are concluded, is a sufficient basis for dismissal of a voluntary termination proceeding.

Under Indiana law the procedures and standards regulating rescission of a consent to a voluntary termination of parental rights are not even similar to the procedures and standards governing withdrawal of consent to adoption.

The Court below examined these two statutory schemes and concluded they are not legal equivalents. The Court concluded that rescission of a voluntary termination of parental rights does not operate to rescind an otherwise valid consent to adoption. Withdrawal of consent to adoption is governed exclusively by Ind. Code 31-3-1-6(f).

The decision was based solely upon an interpretation of Indiana statutes governing voluntary termination and consent to adoption. That decision did not implicate the due process provisions of the Fourteenth Amendment.

### III.

#### THE PETITION IS SIMPLY A REQUEST TO RELITIGATE A QUESTION OF FACT RESOLVED BY THE COURT BELOW

The Court below made specific determinations based upon the facts contained in the record presented by Petitioner. The Court found that:

- 1) There was a valid consent to adoption executed by Petitioner;
- 2) That the consent to adoption was filed with the petition for adoption;
- 3) The consent to adoption has never been withdrawn; and

4) The question of withdrawal of consent to adoption was never at issue in either of the trial courts prior to adoption, nor in the Court of Appeals' previous decision in the Washington County case.

The Court below, in determining whether Simpson's consent to adoption had been withdrawn, found:

[N]either the Washington Circuit Court nor this court considered the separately-signed consent to adoption in addressing the rescission of the parental rights termination. Therefore, we cannot agree with appellant's contention that the rescission of the voluntary termination of parental rights also operated as a rescission of the consent to adoption. *Nowhere in the proceedings is it evident that the separately-signed consent to adoption was ever even considered to be a part of the dispute.* (Emphasis added)

[Opinion Below, Appendix to Petition at B-7, 8]

Thus, the Court below found that Petitioner did not make a request that she be permitted to withdraw her consent to adoption in the Washington Circuit Court proceedings.

The Court also determined that there was no indication *anywhere* in the record below that Petitioner has ever initiated a proceeding seeking permission to withdraw her consent to adoption. Citing Indiana Code 31-3-1-6(f) (A-4), the Court below noted:

Section 6(f) provides the exclusive means by which a consent to adoption may be withdrawn prior to entry of a final decree of adoption. However, *Simpson has failed to indicate that such a procedure was involved in the instant case. Absent such an indication, we cannot say that the separately-signed consent to adoption had been rescinded.* (Emphasis added)

The lower Court's finding of fact—the valid consent to adopt was never withdrawn—is supported by the record.

As a general rule this Court will not exercise jurisdiction merely to review a decision of a state court on a question of



fact. *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). The general rule applies even when the factual nature of the dispute is not apparent until after the petition has been granted. *Southern Power Co. v. North Carolina Public Service Co. et al* 236 U.S. 503 (1924). While the rule does not, jurisdictionally speaking, preclude review, there are very few exceptions to its application.

The Court below, based upon the facts presented in the record, has found that permission to withdraw consent to adoption was never initiated, and the consent to adoption was never withdrawn. Petitioner is now asking this Court to review that finding, determine that it is not supported by the record below, and then decide the due process issue she has posited—adoption without notice and *without consent*—the question *not* decided below.

Because the record clearly supports the lower court's finding. Respondents request this Court to apply its rule against review of decisions on questions of fact and deny the Petition.

### CONCLUSION

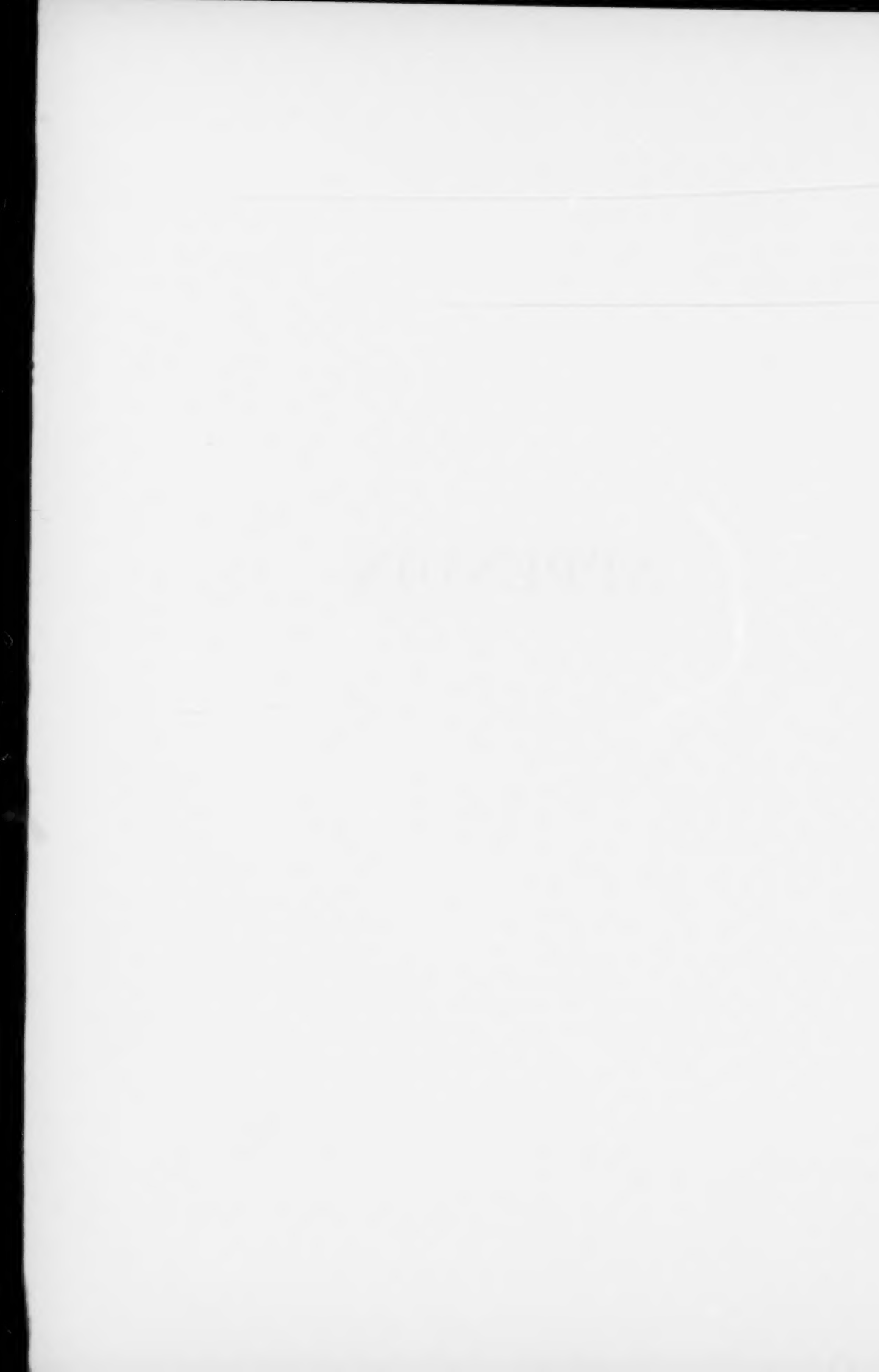
For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# APPENDIX



**31-6-5-2 Petition for voluntary termination of parental rights; notice of hearing; consent to termination; default judgment**

Sec. 2. (a) The county department, or a licensed child placing agency may sign and file a verified petition with the juvenile court for the voluntary termination of the parent-child relationship if requested by the parents. The petition shall be entitled "In the Matter of the Termination of the Parent-Child Relationship of \_\_\_\_\_, a child, and \_\_\_\_\_, his parent (or parents)" and must allege that:

- (1) the parents are the child's natural or adoptive parents;
- (2) the parents, including the alleged, or adjudicated father if the child was born out of wedlock, knowingly and voluntarily consent to the termination of the parent-child relationship;
- (3) termination is in the child's best interest; and
- (4) the petitioner has developed a satisfactory plan of care and treatment for the child.

(b) The parents shall be notified of the hearing in accord with IC 31-6-7-5.

(c) The parents must give their consent in open court unless the juvenile court makes findings of fact upon the record that:

- (1) the parents gave their consent in writing before a person authorized by law to take acknowledgements;
- (2) they were notified of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter; and
- (3) they failed to appear.

Before the court may enter a termination order, it must inquire about the reasons for the parents' absence, and may require an investigation by a probation officer to determine

whether there is any evidence of fraud or duress and to establish that the parents were competent to give their consent. The investigation must be entered on the record under oath by the person responsible for making it. If there is any competent evidence of probative value that fraud or duress was present when the written consent was given, or that a parent was incompetent, the court shall dismiss the petition or continue the proceeding. The court may issue any appropriate order for the care of the child pending the outcome of the case.

(d) Before consent may be given in court the juvenile court must advise the parents of their constitutional and other legal rights and of the consequences of their actions under section 3 of this chapter.

(e) A parent who is incompetent may give his consent to termination only with the approval of the juvenile court or of his guardian. A person under eighteen (18) years of age who is a parent may give his consent without such approval if he is competent except for his age.

(f) If the juvenile court makes findings of fact upon the record that:

(1) one parent has made a valid consent to the termination of the parent-child relationship;

(2) the other parent cannot be located, after a good faith effort has been made to do so;

(3) the other parent has been served with notice of the proceedings in the most effective means under the circumstances; and

(4) the investigation required by subsection (b) has been completed and entered on the record;

it may enter a default judgment against the unavailable parent and terminate as to both parents.

### **31-3-1-6 Consent; authorization; requisites, etc.**

Sec. 6. (a) Except as otherwise provided in this

section, a petition to adopt a child under eighteen (18) years of age may be granted only if written consent to adoption has been executed by:

- (1) each living parent of a child born in wedlock;
- (2) the mother of a child born out of wedlock and the father of such a child whose paternity has been established by a court proceeding;
- (3) any person, agency, or county department of public welfare having lawful custody of the child whose adoption is being sought;
- (4) the court having jurisdiction of the custody of the child, if the legal guardian or custodian of the person of the child is not empowered to consent to the adoption;
- (5) the child to be adopted, if more than fourteen (14) years of age; or
- (6) the spouse of the child to be adopted.

A parent under the age of eighteen (18) years may consent to an adoption without the concurrence of his parent or parents, or the guardian of his person unless the court, in its discretion, determines that it is in the best interest of the child to be adopted to require such a concurrence.

(b) The consent to adoption may be executed at any time after the birth of the child either in the presence of the court, in the presence of a notary public or other person authorized to take acknowledgments, or in the presence of a duly authorized agent of the state or county department of public welfare or licensed child-placing agency.

(c) A consent which does not name or otherwise identify the adopting parent is valid if the consent contains a statement, by the person whose consent it is, that the person consenting voluntarily executed the consent without disclosure of the name or other identification of the adopting parent.

(d) The state department of public welfare may furnish to the clerks of courts prescribed forms for use by parents or other persons when giving consent.

(e) Copies of such a consent when signed shall be filed with the investigating agency and with the clerk of the court in which the petition for adoption is pending. The court shall cause notice of hearing and opportunity to file objection to be given to parents, putative fathers, other necessary parties, and such interested parties as the court in its discretion may direct.

(f) A consent to adoption may not be withdrawn after the entry of the decree of adoption. A consent to adoption may not be withdrawn prior to the entry of the decree of adoption unless the court finds, after notice and opportunity to be heard afforded to the petitioner, the person seeking the withdrawal is acting in the best interest of the person sought to be adopted and the court orders the withdrawal.

(g) Consent to adoption is not required of:

(1) a parent or parents if the child is adjudged to have been abandoned or deserted for six (6) months or more immediately preceding the date of the filing of the petition; or a parent of a child in the custody of another person, if for a period, of at least one (1) year he fails without justifiable cause to communicate significantly with the child when able to do so or knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree (when the parent or parents have made only token efforts to support or to communicate with the child, the court may declare the child abandoned by the parent or parents);

(2) the natural father of a child born out of wedlock whose paternity has not been established by a court proceeding;

(3) a parent who has relinquished his right to consent as provided in this section;



- (4) a parent after the parent-child relationship has been terminated under IC 31-6-5;
  - (5) a parent judicially declared incompetent or mentally defective if the court dispenses with the parent's consent;
  - (6) any legal guardian or lawful custodian of the person to be adopted other than a parent who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his written reasons for withholding consent, is found by the court to be unreasonably withholding his consent.
- (h) Notice of hearing on a petition for adoption need not be given to a person whose consent has been filed with the petition or to a person whose consent is not required by subdivision (g)(3) or (g)(4) of this section.
- (i) Where the parent-child relationship has been terminated under IC 31-6-5, notice of the pendency of adoption proceedings shall be given to the agency or county department of public welfare of which the child is a ward.